CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 346.

THE UNITED STATES, APPELLANT,

vs.

THE CHEROKEE NATION.

No. 347.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE CHEROKEE NATION.

No. 348.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED JULY 19, 1905.

(19848, 19849, 19850)

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1 In the Court of Claims of the United States.

THE CHEROKEE NATION, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT. } No. 23199.

I.—Petition, filed February 20, 1903.

To the honorable the Chief Justice and Associate Justices of the United States Court of Claims:

Your petitioner, the Cherokee Nation, in its own behalf and in behalf of the individuals who are members and citizens of said nation, and interested in the subject-matter of this petition, respectfully represents and shows to this honorable court as follows:

First. That this petition is filed and the jurisdiction of this
2 court is invoked under and by virtue of certain provisions of an act of Congress approved the first day of July, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites, and for other purposes," which said act was in accordance with sections 74 and 75 thereof ratified by the Cherokee Nation at a popular election held August 7th, 1902, and which said act is printed in the session laws of the first session of the 57th Congress, pages 716 to 727.

These provisions, contained in section 68 of said act, are as follows:

"SECTION 68. Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe or any band thereof, arising under treaty stipulations, may have against the United States, which said suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe, or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority by proper orders and process to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination
of the matter in controversy, and any such suit shall on
3 motion of either party be advanced on the docket of either of said courts and be determined at the earliest practicable time."

By section 1 of said act it is further provided, as follows:

"SEC. 1. The words 'Nation' and 'Tribe' shall each be held to refer to the Cherokee Nation or Tribe of Indians in Indian Territory."

Second. The Cherokee Nation, claimant herein, is, and since the act of union between the Eastern Cherokees and Western Cherokees, on July 12th, 1838, has been, a body politic, recognized and dealt with as

such by the United States in all matters affecting the rights, interests, and property of the Cherokee Nation or Tribe, or the members thereof; and is, as such, the "Cherokee Tribe" mentioned in Section 68 of the act of Congress aforesaid, and authorized thereby to bring this proceeding.

Third. At the time of the making of the treaty between the Cherokee Nation and the United States for the cession by the Cherokee Nation of what is known as the "Cherokee Outlet," the said nation, claimant herein, claimed and insisted, and for many years prior thereto had claimed and insisted, that there was due to said nation under the stipulations of various treaties entered into between the United States and said nation certain sums of money, for a true and just account of which and the payment whereof the said Cherokee Nation had been continually requesting and petitioning the United States by memorials to
4 Congress and otherwise. The statement of such an account, and the payment of all moneys due to said nation under the treaty stipulations aforesaid, was demanded by said Cherokee Nation as a condition precedent to, and a consideration for, the cession by it to the United States of said tract of land known as the "Cherokee Outlet."

Fourth. The United States acceded to this demand, and on the 19th day of December, 1891, a treaty was negotiated between the United States and the Cherokee Nation, claimant herein, by duly authorized commissioners of both the parties thereto, duly ratified on the part of the Cherokee Nation, on the 4th day of January, 1892, and on the part of the United States, by act of Congress of March 3rd, 1893 (United States Statutes at Large, Vol. 27, page 640), by the terms of which said treaty, in consideration of the cession and relinquishment by the said Cherokee Nation to the United States of a tract of land in the Indian Territory, containing 8,144,628.91 acres, known as the "Cherokee Outlet," the United States, among other things, expressly undertook and agreed to render to said Cherokee Nation a complete account of moneys due said nation under certain treaties therein specifically mentioned, and to pay such moneys to said nation, which said undertaking and agreement, as contained in the fourth subdivision of the second article of said treaty, is as follows:

"The United States shall, without delay, render to the Cherokee
5 Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835–6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect; and upon such accounting should the Cherokee Nation by its national council conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States, by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting. And the Congress of the United States shall at its next session after such case

shall be finally decided and certified to Congress, according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting."

In compliance with its obligations under said agreement the Cherokee Nation has ceded, relinquished, and conveyed to the United States the tract of land therein described, known as the "Cherokee Outlet."

The provisions of which said treaty, as set forth in the act of
6 Congress ratifying the same (United States Statutes at Large, volume 27, page 640), claimant hereby, by reference thereto, makes a part of this petition.

Fifth. In pursuance of the terms of said treaty, by the third section of the act of Congress ratifying the same, there was appropriated the sum of $5,000 to employ experts to properly render a complete account to the Cherokee Nation of moneys due said nation as required by the fourth subdivision of article 2 of said treaty; and under this provision Messrs. James A. Slade and Joseph T. Bender were employed and appointed as the agents of the United States Government to render to the Cherokee Nation the account required by said fourth subdivision of article 2 of said treaty.

Sixth. Thereafter, under date of April 28th, 1894, the said James A. Slade and Joseph T. Bender rendered "a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect," in accordance with subdivision 4, article 2 of said treaty, ratified March 3, 1893, aforesaid. The amounts found and stated by said accounting to be due from the *from the* United States to the Cherokee Nation are as follows:

"Under the treaty of 1819:	
Value of three tracts of land, containing 1,700 acres, at $1.25 per acre, to be added to the principal of the school fund	$2,125.00
With interest from February 27, 1849, to date of payment.	
7 Under treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund	1,111,284.70
With interest from June 12, 1838, to date of payment.	
Under the treaty of 1866:	
Amount received by receiver of public moneys at Independence, Kansas, never credited to Cherokee Nation	432.28
With interest from January 1st, 1874, to date of payment.	
Under act of Congress, March 3, 1893:	
Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund	20,406.25
With interest from July 1st, 1893, to date of restoration of the principal of the Cherokee funds held in trust in lieu of investments."	

Seventh. The account thus stated was, in accordance with the fourth subdivision of article 2 of said treaty of March 3, 1833, rendered to the Cherokee Nation through R. F. Wyly, the agent duly appointed for that

purpose by authority of the national council of said nation, and was duly accepted by the act of the said national council in the manner and form provided in said treaty; and no suit has been brought by the Cherokee Nation against the United States in the Court of Claims charging that such account was incorrect or unjust.

Eighth. The principal chief of the Cherokee Nation, at the direction of the national council, at once notified the Secretary of the Interior and the Commissioner of Indian Affairs of the acceptance by the national council of the Cherokee Nation of said accounting, and requested the Secretary of the Interior to so notify the Congress of the United
8 States and ask for an immediate appropriation of the amount so stated to be due, in accordance with subdivision 4, article 2, of said treaty, ratified March 3, 1893.

On the 7th day of January, 1895, Hon. Hoke Smith, then Secretary of the Interior, in compliance with the provisions of said subdivision 4 of article 2 of said treaty or agreement, transmitted to the Speaker of the House of Representatives a certified copy of the report of said Slade and Bender, together with a certified copy of the act of the Cherokee national council accepting such accounting.

Which said letter of the Secretary of the Interior, the report and accounting of Messrs. Slade and Bender, and the certified copy of the act of the Cherokee national council accepting such accounting, are set forth in House Executive Document No. 182, 53rd Congress, 3rd session, a copy of which, marked "Exhibit A," is hereby filed and made part hereof.

At the time of the transmission of said accounting to the Speaker of the House of Representatives the Congress of the United States was in session, but Congress, both at that session and at the session immediately following, failed and refused to make an appropriation for the payment of the sum of money found upon such accounting to be due from the United States to the Cherokee Nation and withheld by the United States in violation of the express agreement and obligation of the United States so to do contained in said fourth division of article 2 of said treaty,
9 ratified by act of Congress approved March 3rd, 1893, in consideration of which said agreement and obligation of the United States the Cherokee Nation ceded all that tract of land described in said agreement and known as the "Cherokee Outlet."

Ninth. None of the amounts above stated to be due by the United States to the Cherokee Nation, or any part of them, has ever been paid, nor has Congress to the date of filing this suit made any appropriation of money for the payment of the same.

PRAYER.

Wherefore all of the premises aforesaid considered, the Cherokee Nation prays as follows:

1. That the court adjudge and decree that there is due from the defendant to the claimant herein, and that the defendant pay to claimant the following sums of money found to be due and promised to be paid by the United States by the stipulations of the treaty ratified March 3rd, 1893, aforesaid:

$2,125.00, with interest thereon at the rate of 5 per cent per annum from February 27th, 1819, until paid.

$1,111,284.70, with interest thereon at the rate of 5 per cent per annum from June 12th, 1838, until paid.

$432.28, with interest thereon at the rate of 5 per cent per annum from January 1st, 1874, until paid.

10 2. That the court adjudge and decree that the defendant shall restore to the Cherokee funds held in trust in lieu of investments the sum of $20,106.25, together with interest thereon at the rate of 5 per cent from July 1st, 1893, to the date of the restoration of said principal sum.

3. For such other and further relief as to the court shall seem meet and proper.

THE CHEROKEE NATION,
By THOMAS M. BUFFINGTON,
Principal Chief of the Cherokee Nation.

EDGAR SMITH,
Attorney of Record, Vinita, Indian Territory.
FINKELNBURG, NAGEL & KIBBY,
Of Counsel.

11 INDIAN TERRITORY,
Northern District, ss:

Thomas M. Buffington, of Vinita, Indian Territory, being duly sworn, on his oath states that he is the principal chief of the Cherokee Nation; that he has read the foregoing petition of said Cherokee Nation, claimant, and that the matters and facts therein set forth are true to the best of his knowledge and belief.

THOMAS M. BUFFINGTON.

Subscribed and sworn to before me this 14th day of February, A. D. 1903.

[SEAL.] G. P. FOGLE, *Notary Public.*

My commission expires Oct. 31, 1905.

Exhibit "A," as described herein, was filed with this petition.

12 THE EASTERN CHEROKEES } No. 23212.
vs.
THE UNITED STATES. }

II.—Original petition, filed March 10, 1903.

Your petitioners represent as follows, viz:

1. That they number about 3,000 persons, more or less, all Eastern Cherokees, residing for the most part in Cherokee, Graham, Swain, and Macon Counties, North Carolina, some in north Georgia and Eastern Tennessee, together with about 800 persons, portions of their various families, gone west, nearly all of whom have been recognized as citizens and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina.

2. This suit is brought under authority contained on pages 16 and 17 of the Indian appropriation bill, Public No. 144, of the 2d session of

the 57th Congress, passed March 3, 1903, a copy of which is herewith filed, marked Exhibit "A," and the amendment to the Cherokee agreement, Exhibit "B," otherwise known as the Cherokee allotment, Public
241, pages 11, 12, and 13, of the 1st session of the 57th Congress,
13 passed July 1, 1902, with reference to House Executive Doc. 309, of the 2d session of the 57th Congress, Exhibit "C," copies of these acts also filed, and containing the provision that not only all Eastern Cherokees, but that the Cherokee Nation shall be made party to any suit filed thereunder, and requiring that in causes of this kind "per capita payments shall be made directly to each individual * * * that jurisdiction be conferred on the Court of Claims to examine, consider, and adjudicate, with a right to appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations may have against the United States upon which suit shall be instituted." This is one of the class of cases named.

3. Wherefore we request the honorable court that not only the rest of the Eastern Cherokees, but that the Cherokee Nation, be made parties to this suit, as required by these several acts herein set forth.

4. That the object of this suit by the claimants herein is to recover from the United States their pro rata share of that portion of improperly
taken by the United States from the five million fund on account
14 of removal of E. Cherokees, as found by the expert accountants, Messrs. Slade and Bender, April 28, 1894, the said five million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the Government to the Eastern Cherokees for the sale of their lands in North Carolina, Georgia, and Tennessee, or east of the Mississippi River, as set forth in article 1st of the treaty of New Echota, in north Georgia, on March 14, 1835, and articles 2 and 3 of the supplemental treaty, proclaimed May 23, 1836, this sum so misapplied amounting, in accordance with said accounting, to one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70), with interest at 5% per annum from the date of said wrongful taking, June 12, 1838, to date.

5. All of the matters and things set forth in the above paragraph have been the subjects of investigation in minute detail by this honorable court, and is well known to them, their careful investigation resulting in the "Findings of fact" made by this honorable court in cause No. 10386 Congressional, of date April 28, 1902, and fully set forth in Senate Document No. 374 of the 1st session of the 57th Congress, a copy of which is herewith filed, and which we pray to make a part of this our petition. See Exhibit "D."

15 6. It will be seen by this document named above, as well as by the treaties of 1835–6, that the "Five-million dollar fund" was distinctly a fund of the Eastern Cherokees and not of the Cherokee Nation, although it was adjudged that a sum equal to one-third of this sum should be paid to the Western Cherokees, so called (see article 4 of the sixth treaty of Washington), and this portion was paid to the Western Cherokees September 30, 1850, pp. 556–9, Stat. at Large, so that their claim to this fund having been fully extinguished, the "Nation,"

so called, has no title whatever to the amount sought to be recovered in this controversy, although it has been so claimed; and under the Curtis Act the authorities of the "Nation" are forbidden to receive and distribute any funds belonging to the Cherokee people after the passage of that act.

7. When this court sent its "Findings of fact" to the 57th Congress that body referred this claim to the Committees on Indian Affairs of the Senate and House, and the Senate committee appointed a subcommittee to consider the bill, Senate No. 5685, Exhibit "E," of the 1st session of the 57th Congress, of Senators Morgan, Quay, McCumber, and others.

We beg leave to file herewith that bill and the report thereon of
16 that subcommittee submitted by Senator John T. Morgan, marked Exhibit "F," and to call special attention to the paragraph next to the closing one, showing why interest should be paid on this fund, and also to call attention to the hearing before the full committee, marked Exhibit "G." Wherefore, considering all of the matters and things set forth in this petition, together with the accompanying exhibits, your petitioners pray as follows, viz:

PRAYER.

That this honorable court shall render a judgment in this case in accordance with the act of March 3, 1903, awarding to the Eastern Cherokees $1,111,284.70, as found by the accountants, Messrs. Slade and Bender, with interest thereon as required by law from June 12, 1838, and shall from this sum so found to be due set apart to your petitioners their proportion of this amount, according to the number of Eastern Cherokees, to be paid to them as individuals, the name and address of each claimant, with a proper power of attorney, being distinctly set forth in the list of names and powers herewith filed, as it is not sought in this contention to interfere with the rights of such Eastern Cherokees as have employed other counsel, and thus will ever pray.

BELVA A. LOCKWOOD,
Counsellor for Petitioners.

17 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before the undersigned, a notary public in and for the District of Columbia, the attorney whose name is signed to the above petition, who, being sworn in due form of law, deposes and says: I have read the above petition by me subscribed and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true, and that I have authority under seal to sign the names of and to represent in this cause each and every one of the petitioners sought to be represented therein.

(Signed) BELVA A. LOCKWOOD,
For the Eastern Cherokees.

Sworn and subscribed before me this 7th day of March, 1903.

JAY G. WILSON,
Notary Public.

Exhibits A, B, C, D, E, F, and G, as set out herein, were filed with this petition.

18 THE EASTERN AND EMIGRANT CHEROKEES
vs.
THE UNITED STATES. } No. 23212.

III.—Amended petition, filed September 3, 1903.

Your petitioners represent as follows, viz:

1.

That they number about 4,500 persons, more or less, all Eastern or Emigrant Cherokees, residing for the most part in Cherokee, Graham, Swain, Clay, and Macon counties, North Carolina, some in north Georgia, northern Alabama, and eastern Tennessee, together with about 1,500 Emigrants, portions of their various families, gone west, nearly all of whom have been recognized as citizens and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina, and others of the same class, whose names or those of whose ancestors may be found on the rolls of 1835 and 1838.

2.

This suit is brought under authority contained on pages 16 and 17 of the Indian appropriation bill, public, No. 144, of the 2d session of the 57th Congress, passed March 3, 1903, a copy of which is herewith filed, marked "Exhibit A," and the amendment to the Cherokee agreement, Exhibit "B," otherwise known as the Cherokee allotment, public 241, pages 11, 12, and 13, of the 1st session of the 57th Congress, passed July 1, 1902, with reference to House executive doc. 309 of the 2d session of the 57th Congress, Exhibit "C," copies of these acts also filed, and containing the provision that not only all Eastern Cherokees, but that the Cherokee Nation shall be made party to any suit filed thereunder, and requiring that in causes of this kind "per capita payments shall be made directly to each individual; * * * that jurisdiction be conferred on the Court of Claims to examine, consider, and adjudicate, with a right to appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims any claim which the Cherokee tribe or any band thereof arising under treaty stipulations may have against the United States, upon which suit shall be instituted." This is one of the class of cases named. We claim as individuals, and our names and addresses are filed with this petition.

19 The roll of 1835 shows 15,000 persons East, with 2,202 removed to Indian Territory. The roll of 1838 shows 16,211 Cherokees removed. The present number still remaining in North Carolina, etc., 4,000. Number of Eastern Cherokees in Indian Territory, 17,000. Total of Eastern Cherokees, 21,000. Whole number now in Indian Territory, 40,000, including 4,000 negroes, 1,000 Shawnees and Delawares, and 4,000 adopted citizens.

3.

Wherefore we request the honorable court that not only the rest of the Eastern Cherokees, but that the Cherokee Nation, be made parties to this suit, as required by these several acts herein set forth.

4.

That the object of this suit by the claimants herein is to recover from the United States their pro rata share of that portion of the removal and subsistence fund improperly taken by the United States from the five million fund, on account of removal of Eastern Cherokees, as found by the expert accountants, Messrs. Slade and Bender, April 28, 1894, the said five million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the Government to the Eastern Cherokees for the sale of their lands in North Carolina, northern Alabama, Georgia, and Tennessee, or east of the Mississippi River, as set forth in article 1st of the treaty of New Echota in north Georgia on March 14, 1835, and articles 2 and 3 of the supplemental treaty proclaimed May 23, 1836, this sum so misapplied amounting in accordance with said accounting to one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70), with interest at 5% per annum from the date of said wrongful taking, June 12, 1838, to date, in accordance with treaty stipulations.

5.

All of the matters and things set forth in the above paragraph have been the subjects of investigation in minute detail by this honorable court, and is well known to them, their careful investigation resulting in the "findings of fact" made by this honorable court in cause No. 10386 Congressional, of date April 28, 1902, and fully set forth in Senate Document No. 374 of the 1st session of the 57th Congress, a copy of which is herewith filed, and which we pray to make a part of this our petition. (See Exhibit D.)

6.

It will be seen by this document named above, as well as by the treaties of 1835–6, that the "five million dollar fund" was distinctly a fund of the Eastern Cherokees, and not of the Cherokee Nation, although it was adjudged that a sum equal to one-third of this sum should be paid to the Western Cherokees, so called (see article 4 of the sixth treaty of Washington), and this portion was so paid to the Western Cherokees September 30, 1850 (pp. 556–9 Stat. at Large), so that their claim to this fund, having been fully extinguished, the "nation," so called, has no title whatever to the amount sought to be recovered in this controversy, i. e., the amount contained in the second item of the commissioners' report, although it has been so claimed; and under the Curtis Act the authorities of the "nation" are forbidden to receive and distribute any funds belonging to the Cherokee people after the passage of that act. (See U. S. Stat. 30, p. 495; also act March 3, 1893.)

7.

When this court sent its "Findings of fact" to the 57th Congress, that body referred this claim to the Committees on Indian Affairs of the Senate and House, and the Senate committee appointed a subcommittee to

consider the bill, Senate No. 5685, "Exhibit E," of the 1st session of the 57th Congress, of Senators Morgan, Quay, McCumber, and others.

We beg leave to file herewith that bill and the report thereon of that subcommittee submitted by Senator John T. Morgan, marked "Exhibit F," and to call special attention to the paragraph next to the closing one, showing why interest should be paid on this fund, and also to call attention to the hearing before the full committee marked "Exhibit G." Wherefore, considering all of the matters and things set forth in this petition, together with the accompanying exhibits, your petitioners pray as follows, viz:

PRAYER.

That this honorable court shall render a judgment in this case in accordance with the act of March 3, 1903, awarding to the Eastern Cherokees $1,111,284.70, as found by the accountants, Messrs. Slade and Bender, with interest thereon as required by law, from June 12, 1838, and shall from this sum so found to be due, set apart to your petitioners their proportion of this amount, or one-fifth of the whole amount, according to the number of Eastern Cherokees, enumerated in this claim, to be paid to them as individuals, the name and address of each claimant, with a proper power of attorney being distinctly set forth in the list of names and powers herewith filed, as it is not sought in this contention to interfere with the rights of such Eastern Cherokees as have employed other counsel, and thus will ever pray.

(Signed) BELVA A. LOCKWOOD,
Counsellor for Petitioners.

21 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before the undersigned, a notary public in and for the District of Columbia, the attorney whose name is signed to the above petition, who, being sworn in due form of law, deposes and says: "I have read the above petition by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true, and that I have authority under seal to sign the names of and to represent in this cause each and every one of the petitioners sought to be represented therein."

(Signed) BELVA A. LOCKWOOD,
For the Eastern and Emigrant Cherokees.

Sworn and subscribed before me this 2nd day of Sept., 1903. Interlined before signing.

(Signed) JAY G. WILSON,
Notary Public.

22 THE EASTERN CHEROKEES
vs.
THE UNITED STATES AND THE CHEROKEE NATION. } No. 23214.

IV.—Original petition, filed March 14, 1903.

To the honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioners, the Eastern Cherokees, respectfully show and represent unto your honors that—

I.

The Eastern Cherokees, the petitioners in this case, comprise those persons who were parties to the treaty of 1835–36 (7 Stats. L., p. 479); being also those persons described in article 9 of the treaty of 1846 (9 Stats. L., p. 871) as—

"Those individuals, heads of families, or their legal representatives, entitled to receive" the per capita pledged by "the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

By far the larger portion of the Eastern Cherokees are now resi-
23 dent in the Cherokee Nation, Indian Territory, estimated to number more than thirty thousand in the West; while another body, estimated to number about three thousand, reside east of the Mississippi River, the larger part being located in the State of North Carolina.

II.

The Eastern Cherokees, being either the original persons, parties to the treaty of 1835–36, or their descendants, have organized by various conventions and councils in the Indian Territory and in North Carolina, and have employed by their proper authorities to represent their interests in the claim which is the subject-matter of this suit the attorneys whose names are appended to this petition.

III.

THE CLAIM.

Your petitioners, first protesting that the matters of difference between themselves and the United States, have been fully and finally adjudicated in the course of an arbitration had for the purpose (to which reference is hereinafter made), and now specially disclaiming, as they have ever done, any purpose to evade the result of said arbitration, or to admit that it is subject to impeachment on any ground, further show and state that they claim from the United States the sum of one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70), or the sum of one million seven hundred and sixty-one thousand four hundred and fifty-seven dollars and
24 twenty-seven cents ($1,761,457.27), accordingly as the court may or may not sustain the award to which reference is made in this paragraph, with interest thereon, at the rate of five per cent per annum,

from June 12, 1838, until paid, together with interest on the income annually accruing, at the rate of five per centum per annum until paid.

The method of calculating the interest forms the subject of a separate subsequent paragraph.

IV.

JURISDICTION OF THE COURT.

Section sixty-eight of the act of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation, and for the disposition of town sites therein and for other purposes" (32 Stats. L., p. 716), is as follows:

"SEC. 68. Jurisdiction is hereby conferred upon the Court of Claims, to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

On March 3, 1903, in the "act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1904, and for other purposes" (Public 144, p. 16), occurs the following provision:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together, or as two bodies, as they may be advised, the status of a band, or bands, as the case may be, for all the purposes of said section: *Provided*, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be

further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said sec-
26 tion upon the claim mentioned in House of Representatives Executive Document Numbered Three hundred and nine, of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants, to whom the judgment so rendered, equitably belongs either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in House of Representatives Executive Document Number Three hundred and nine of the second session of the Fifty-seventh Congress, above referred to, is the claim described in the resolution of the House of Representatives of December 16, 1902, as follows, to wit:

"*Resolved*, That the Attorney-General of the United States is hereby requested to advise the House of Representatives with all convenient speed, in the case of the Eastern Cherokees against the United States, whether or not the award rendered under the Cherokee agreement of December nineteenth, eighteen hundred and ninety-one, ratified by act of Congress approved March third, eighteen hundred and ninety-three, as set forth in House Executive Document Numbered One hundred and eighty-two of the Fifty-third Congress, third session, and the findings of fact of the Court of Claims of April twenty-eighth, nineteen hundred and two, is *res adjudicata;* to review the opinion of the Department of Justice of December second, eighteen hundred and ninety-five, and advise the House of Representatives whether the reasons set forth in that opinion now constitute a valid defense to the payment of said award."

27 Said claim is the claim of the Eastern Cherokees against the United States hereinafter particularly described and set forth.

The Cherokee Nation is made defendant in accordance with the requirement of the act of reference.

FACTS RELATING TO THE PRINCIPAL FUND.

V.

In 1803 the United States engaged with the State of Georgia to induce the Cherokee Indians within that State, as soon as practicable, to remove from the State, and to give up their tribal government within the State of Georgia; and various efforts were made on the part of the United States to induce the Cherokees to remove from the East to the West.

A number of them removed under the provisions of the treaties of 1817, 1819, 1828, and 1833: they are known as the "Western Cherokees." The removal of your petitioners, the larger portion of whom finally went to the Indian Territory, was not accomplished until after the making of

the treaty of 1835–36. That treaty contained provisions permitting those electing to do so to remain in the East; those so electing to remain in the East numbered, in 1852, about 2,133; by the last enrollment made of them, in 1884, they numbered about 3,000. This terminated the efforts on the part of the United States and the States concerned to effectuate the removal of the Cherokees from the East.

28 By article 8 of the treaty of 1828 (7 Stat. L., 311) in pursuance of the purpose of the United States and as an inducement to the Indians to remove, the United States contracted that it would pay the cost of the removal of all Cherokees from the east to the west. This contract was in full force when the treaty of 1835–36 was made, and was recognized as being in force by the authorities of the United States long after the execution of that treaty. (Eastern Cherokees vs. The United States, No. 10386, finding 6. Sen. Doc. 215, Fifty-sixth Congress, first session, p. 79, last paragraph.)

It was the general policy of the United States in the furtherance of its own purposes exclusively to pay the expenses of the removal and subsistence of the Indians when transferring them from the east to the west. Chickasaws, Choctaws, Creeks, and Seminoles, neighboring tribes to the Cherokees, had all been removed at the expense of the United States, and the Cherokees were generally informed of that fact. (Senate Doc. 215, 56th Cong., 1st sess., p. 83.)

VI.

. Under a reference by Congress your petitioners have been heretofore suitors in this court in Congressional case No. 10386, wherein the court made certain findings of fact in accordance with the reference of the claim. In said findings of fact are adjudicated nearly all the material facts necessary now to be presented, and full reference is made in this petition to said findings, some of the allegations being taken bodily from the findings.

In said case the court (finding 6) held, and it is now alleged, that:

29 "On March 5th, 1835, the Senate of the United States, by resolution, advised:

"That a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River. (Sen. Doc. 215, 56th Cong., 1st sess., p. 77.)

"On March 14, 1835, a treaty was drawn up by J. W. Schermerhorn, commissioner, on the part of the United States, for submission to the Cherokees, in which it was proposed that the sum of five million dollars should be paid to them for their lands and possessions, in accordance with the foregoing resolution of the Senate, but that there should be deducted from the said sum of five millions of dollars two hundred and fifty-five thousand dollars for the expenses of the removal of the members of the tribe. (Ibid., 81 and 82.)

"At this time the treaty of 1828 (7 Stats. L., 313) was in full force, by the 8th article of which it was provided that the United States would pay the cost of removal of the Cherokees from the east to the west.

"This proposed treaty was rejected by the Cherokee council on October 23, 1835, for the reason that the expense of removal was proposed to

be charged to the five million dollar fund (Ibid., 83, par. 5.) The rejection of this treaty was unanimous. (Sen. Doc. 120, 25th Con., 2d sess., 459.)

"During the consideration of this proposed treaty by the Indians a letter from President Jackson, bearing date March 16, 1835, was read to the Cherokees, purporting to explain the proposed treaty That letter is as follows:

"'I shall in the course of a short time appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you more fully my views and the nature of the stipulations which are offered to *to* you.

"'These stipulations provide—

"'1st. For an addition to the country already assigned to you west of the Mississippi, and for the conveyance of the whole of it, by patent, in fee simple, and also for the security of the necessary political rights, and for preventing white persons from trespassing upon you.

30 "'2d. For the payment of the whole value to each individual of his possessions in Georgia, Alabama, North Carolina, and Tennessee.

"'3d. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of one hundred and fifty dollars to each person.

"'4th. For the usual supply of rifles, blankets, and kettles.

"'5th. For the investment of the sum of four hundred thousand dollars, in order to secure a permanent annuity.

"'6th. For adequate provisions for schools, agricultural instruments, domestic animals, missionary establishments, the support of orphans, etc.

"'7th. For the payment of claims.

"'8th. For granting pensions to such of your people as have been disabled in the service of the United States.

"'These are the general provisions contained in the arrangement. But there are many other details favorable to you which I do not stop here to enumerate, as they will be placed before you in the arrangement itself. Their total amount is four million five hundred thousand dollars, which, added to the sum of five hundred thousand dollars, estimated as the value of the additional land granted you, makes five millions of dollars—a sum, if equally divided among all your people east of the Mississippi, estimating them at ten thousand, which I believe is their full number, would give five hundred dollars to every man, woman, and child in your nation. There are few separate communities, whose property, if divided, would give to the persons composing them such an amount.'" (Sen. Doc. No. 215, 56th Con., 1st sess., p. 82.) (Eastern Cherokees vs. United States, No. 10386. Finding 6.)

This proposed treaty of March 14, 1835, rejected October 23, 1835, in article 18 contained an estimate for carrying into effect the several stipulations of the proposed treaty. The estimate for removal was two hundred and fifty-five thousand dollars. The estimate for sub-

31 sistence was four hundred thousand dollars (Senate Doc. No. 215, 56th Congress, 1st session, p. 82.)

VII.

Immediately after the rejection of the above treaty a convention of Cherokees was appointed by Commissioner Schermerhorn to convene at New Echota on the 21st day of December, 1835, proposing to make a treaty with such Cherokee people as should assemble there, and declaring that those who did not come should be held as having given their assent and sanction to whatever should be transacted at that council. (Revision of Indian Treaties, p. 67.)

This treaty was effected not only without any authority of the Cherokees, but over their solemn protest. It was procured by bribery and coercion, and was bitterly repudiated by the great body of the Cherokees, of whom nineteen-twentieths were violently opposed to it. (Western Cherokees vs. U. S., 27 Ct. Cls., pp. 21–30.)

By article 8 of this treaty the United States agreed and stipulated—

"To remove the Cherokees to their new homes, and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician, well supplied with medicines, shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in
32 lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it."

By article 16 it was agreed that the Cherokees should remove to their new homes within two years from the ratification of this treaty. The treaty was ratified May 23, 1836, and the two years expired on May 23, 1838, a day notable in this history, as will hereafter appear.

By article 1, in consideration of five million dollars, the Cherokee Nation conveyed to the United States their lands east of the Mississippi River, and released all their claims upon the United States for spoliations, with the agreement that the question as to the duty of the United States to allow an additional sum of three hundred thousand dollars for the spoliations should be submitted to the Senate for their decision. The question of spoliation was decided in favor of the Cherokees, as shown in the supplementary articles of the treaty.

By article 15 it was agreed that the five million dollars, after deducting the amounts actually expended for the payment of improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims of the Cherokee Nation, and the several sums to be invested to constitute the general national funds, should be equally divided among the Eastern Cherokees.

VIII.

"After the signature of the treaty the leaders of the treaty party who signed the treaty contended that the sum of $5,000,000 was not intended to include the amount which might be required to remove them.
33 The President was willing that this subject should be referred to the Senate for its consideration, to the end that if the expense of

removal was not to be charged to the treaty fund, such further provisions should be made therefor as might appear to the Senate to be just. The Senate thereupon agreed that the sum of $600,000 should be allowed to the Cherokee people to include the expense of their removal. This sum was estimated as more than sufficient to pay the cost of such removal, and it was provided that whatever surplus remained after the payment of the expenses of removal, and certain other claims, should be turned over and belong to the education fund (7 Stat. L., p. 489, Supp. Art. 3).

"On July 2, 1836, Congress confirmed the action of the Senate and appropriated the $600,000 (5 Stat. L., p. 73)." (Eastern Cherokees vs. U. S., No. 10386, finding 6.)

On July 2, 1836 (the same day), Congress appropriated the $5,000,000 pledged to the Cherokees by the above treaty, less $500,000 stipulated to be paid for the lands provided for them west of the Mississippi, known as the neutral lands, comprising 800,000 acres in Kansas (5 Stat. L., 73).

By the terms of this treaty the Eastern Cherokees ceded and conveyed to the United States lands in Tennessee, Georgia, Alabama, and North Carolina, comprising seven million eight hundred and eighty-two thousand two hundred and forty acres.

The country was splendidly watered, finely timbered, and contained great quantities of marbles and other minerals, including gold, which was then thought of enormous value. Through their principal chiefs
34 they demanded twenty millions of dollars for this country (Senate Doc. No. 392, 56th Cong., 1st session, p. 4; History of Cherokee Indians, Joyce, Bureau of Ethnology, p. 378).

Their title to this country was unquestioned. (Worcester vs. Georgia, 6 Peters, 516; Cherokee Nation vs. Georgia, 5 Peters, 1.)

They received for this country 800,000 acres in Kansas, thus yielding to the United States 7,082,240 acres net, for which the Eastern Cherokees were to receive $4,500,000. This fund was to pay not only for the land but for improvements and ferries.

As will be hereinafter more particularly shown, the matters of account between the Eastern Cherokees and the United States were submitted to two Government experts, who made a report known as the Slade-Bender award. In the account stated by them it is shown that there was paid for improvements, $1,540,572.27; for ferries, $159,572.12; a total of $1,700,144.39.

The treaty of 1835–36 thus realized to the Eastern Cherokees for their lands (7,082,240 acres) the promise of $2,799,855.61. If the sum subsequently charged for removal and subsistence, to wit, $2,952,196.26, were properly chargeable against this fund, it would leave the Eastern Cherokees indebted to the United States, and, therefore, without any consideration moving the Indians to cede exceeding seven millions of acres of land to the United States, and without any consideration for complying with the urgent desire of the United States to relinquish their homes and move into the unbroken wilderness west of the Mississippi River.

35 **IX.**

In the said award of the accountants, Slade and Bender, it was said, and your petitioners therefore charge, that—

"It seems to have been the opinion of the War Department, as late as November 18, 1836, that article 8 of the treaty of 1828" [providing

that the United States would remove the Cherokees from the East to the West at the expense of the United States], "Was not superseded or annulled by the treaty of 1835. On that date Mr. Commissioner Harris wrote Maj. B. F. Curry, Indian agent in the Cherokee country, as follows:

"'SIR: I acknowledge the receipt of your letter of the 26th of October last, and in reply have to observe that I have taken the decision of the Secretary of War ad interim upon the claim of the Cherokees to commutation for subsistence at $33.33 each. The Secretary decides that the commutation may be paid at the rate above stated; but at the same time declares that the allowance is made under the treaty of 1828, and not in pursuance of any stipulation of the final treaty of 1835.'

"The same opinion has been held in various reports to the Senate and the House of Representatives from the Committee on Indian Affairs." (Senate Doc. No. 215, 56th Congress, 1st session, pp. 79–80.)

X.

After the treaty of 1835 had been made, enrollment books for voluntary emigration were opened in the then Cherokee country. Instructions as to the nature of the enrollment were sent out by the Acting Secretary of War, C. A. Harris, to Lieutenant J. Van Horne, U. S. A., dated October 12, 1837, in part as follows:

"Enrolling books must be prepared on the following plan: A
56 memorandum or entry must be inserted, purporting that the subscribers assent to a treaty with the United States upon the terms heretofore offered by the President to their people, and that if no treaty should be made during the next fall, or early in the winter, then the subscribers will cede to the United States all their right and interest in the Cherokee lands east of the Mississippi, upon the following conditions: That they shall receive, so fast as Congress shall make the necessary appropriations, the ascertained value of their improvements, on their arrival West; that they shall be removed and subsisted for one year at the expense of the United States; that they shall be entitled to all such stipulations as may be hereafter made in favor of those who do not now remove, excepting so far as such stipulations may depend on the cession of rights or improvements for which the subscribers have been previously allowed a compensation. (Senate Doc. No. 215, 56th Congress, 1st session, page 83.)

XI.

"In May, 1838, the President transmitted to Congress a letter from the Secretary of War to John Ross, principal chief of the Cherokee Nation, bearing date of May 18, 1838, in which it was said:

"'If it be desired by the Cherokee Nation that their own agent should have charge of their emigration, their wishes will be complied with, and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect. With regard to the expense of this operation, which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made of Congress.'

"This last communication was transmitted to Congress; and on May 23, 1838, the House of Representatives, by resolution, required a statement of the amount necessary to pay for the removal and subsistence of the Cherokees (ibid., 78). On May 25, 1838, the Secretary of
27 War submitted an estimate to the Speaker of the House of Representatives 'of the amount that would be required' to remove 15,840 Cherokees, and to subsist 18,336 Cherokees, stating that the sum necessary for this purpose was $1,047,067 (ibid., 78); and on June 12, 1838, Congress appropriated the amount of this estimate with the provision that no part of it should be deducted from the $5,000,000 fund (5 Stat. L., 242).

"Without further appropriation the removal of the Indians (except a small number which never removed) was accomplished." (Eastern Cherokees vs. U. S., No. 10386, finding 6.)

The estimate submitted by the Secretary of War above referred to is as follows:

"In compliance with the resolution of the House of Representatives of the 23rd instant, requiring a statement of the amount that will be required for the additional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

The payment of the expenses of removing the remaining Cherokees, estimated at 15,840, at $30 a head	$475,200.00
Amount applicable to that purpose	39,300.00
Balance to be provided for	435,900.00
If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival in the West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated to be paid by treaty, viz. $33.33 a head	611,167.00
	1,047,067.00

(Sen. Doc. 215, 56th Congress, 1st sess., p. 78.)

"On June 12, 1838, Congress appropriated the full amount estimated by the Secretary of War as sufficient to remove and subsist the Cherokees as follows, to wit:
38 "SEC. 2. And be it further enacted, That the further sum of one million forty-seven thousand and sixty-seven dollars be appropriated, out of any money in the Treasury not otherwise appropriated, in full for all objects specified in the third article of the supplementary articles of the treaty of eighteen hundred and thirty-five, between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal West.

"Provided, That no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty: And provided further, That the said Indians shall receive no benefit from the said appropriation, unless they shall complete their emigration within such a time as the President shall deem reasonable, and without coercion on the part of the Government."

(Act June 12, 1838, 5 Stats. L., 242.)

XII.

The cost of removing the Cherokees from Georgia to the Indian Territory was $1,493,485.92, of which $382,201.22 was paid out of the amounts appropriated ($1,647,067) for removal by the acts of July 2, 1836, and June 12, 1838, the balance, $1,111,284.70, being charged against the five million dollar fund, as above set forth, which still remains a charge against that fund. (Eastern Cherokees vs. U. S., No. 10386, findings 5.)

This sum, $1,111,284.70, with interest thereon, is the fund now claimed by the Eastern Cherokees as due to them, and is the same fund found due by the Slade and Bender award under the Cherokee agreement of December 19, 1891, as hereinafter set forth.

39 Your petitioners state and charge that under the law appropriating $600,000 primarily for the purpose of removal, and the $1,047,067 for the same purpose, it was the duty of the defendant to have made the expense of removal the first charge upon the said sums appropriated for such purpose. That this view as to the duty of the defendant was fully set forth in the opinion of the Attorney-General of the United States, Hon. B. F. Butler, on December 6, 1837 (Opinions Attorney-General, vol. 5, p. 297), in which he held that—

"The expense of removal is undoubtedly the first charge on the $600,000."

Your petitioners state and charge that the defendant had no right to charge the trust fund of five million dollars appropriated in payment of the lands and improvements of the Eastern Cherokees with the expense of removal, which they now charge was an obligation exclusively of the United States, entered into by the United States in fulfillment of its own policy and for its own purposes, and for the payment of which an abundant sum of money had been appropriated.

XIII.

When the Eastern Cherokees removed in 1838 to Indian Territory they took with them the government of which John Ross was the principal chief, and this led to a conflict with the Western Cherokees, who were unwilling to relinquish the government they had previously established and to be merged into and overwhelmed by the government organized by the Eastern Cherokees. As was said by this court—

40 "The Western Cherokees maintained that they were possessed of their own country, purchased with their own money, subject to their own laws, ruled by their own constituted authorities, and that the coming of the Eastern Cherokees, uninvited, so far as they were concerned, could not overthrow their existing constitution and government. Either party's deductions were right from their own premises. The trouble was that the two were utterly irreconcilable, and the certainty was that if the Western Cherokees acceded to the seemingly fair proposition to hold a council and frame a government for all they would immediately be swallowed up in the overwhelming majority of the Eastern Cherokees" (27 Ct. Cls., 30).

This conflict produced internal disorder of the gravest character between the Eastern and Western Cherokees, and made the treaty of 1846 imperative.

XIV.

In the specific words of the Court of Claims in the case of the Eastern Cherokees vs. U. S., No. 10386, Congressional, Finding VII, it is further shown that—

"The treaty of 1846 between the United States and the Cherokee Nation was entered into to restore peace and harmony among the Cherokee factions, to settle the claims of the Indians against the United States (preamble, treaty 1846, 9 Stat. L., p. 871) and 'to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be' (Western Cherokee Indians vs. the United States, 27 Ct. Cls., 36, par. 5).

"At the time when the treaty with the Cherokees of August 6, 1846 (9 Stat. L., p. 871), was being negotiated the Cherokees insisted that the treaty fund had been improperly charged with various sums, which ought to be corrected, and that they should receive from the
41 United States a fair and just settlement which should only exhibit money properly expended under the treaty of 1835. Accordingly, when the treaty of 1846 was drawn up, it was provided in article three that various sums which had been improperly charged to the five million dollar fund should be reimbursed, to wit:

"Those sums paid for rents under the name of improvements and spoliations for property of which the Indians were dispossessed, and under the head of reservations, and under the head of expenses of making the treaty of New Echota; and the United States agreed to reimburse all other sums paid to any agent of the Government and improperly charged to said fund (9 Stat. L., 872).

"By the ninth article of the treaty, arranging the general plan of settlement, it was provided as follows:

"'The United States agrees to make a fair and just settlement of all moneys due to the Cherokees and subject to the per capita division under the treaty of the 29th of December, eighteen hundred and thirty-five, which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations, removal subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835—the aggregate of which said several sums shall be deducted from the sum of six million six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, per capita in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplements of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto' (9 Stat. L., 875)." This amount of six million six

hundred and forty-seven thousand and sixty-seven dollars was made up as follows:

42 The treaty fund of 1835	$5,000,000
Supplementary articles fund	600,000
Appropriation act, June 12, 1838 (5 Stat. L., 242)	1,047,067
Total	$6,647,067

"The treaty also provided that, whereas the Cherokee delegation contend that the amount expended for the one year's subsistence after the arrival in the West of the Eastern Cherokees is not properly chargeable to the treaty fund, it was thereby agreed that the question should be submitted to the Senate of the United States for its decision, which should decide whether the subsistence was to be borne by the United States or by the Cherokee funds; and if by the Cherokees, then to say whether the subsistence should be charged at a greater rate than thirty-three and thirty-three one-hundreths dollars per head; and also the question whether the Cherokee Nation should be allowed interest on whatever sum should be found to be due the nation, and from what date and at what rate per annum.

"The Senate of the United States, acting as umpire under article eleven of the treaty of 1846, on September 5, 1850, passed the following resolution:

"'Resolved by the Senate of the United States, that the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury.

"'Resolved, that it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid' (Sen. Journal, Thirty-first Congress, first session, p. 602).

43 "This last amount was accordingly appropriated by Congress for that purpose by the act of September 30, 1850, with the provision that interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate of the 5th of September, 1850" (9 Stat. L., 556).

XV.

In the words of the same opinion (Finding VIII), it is further shown that—

"Under the ninth article of the treaty of 1846 the accounting officers of the United States made and prepared the account for settlement prescribed by that article, whereby it appears that after crediting the treaty fund of five million dollars with the cost of subsistence of the Indians at the West, with which it had been charged, there would remain a balance of nine hundred and fourteen thousand and twenty-six dollars and thirteen cents. Congress accordingly appropriated, in addition to the amount of one hundred and eighty-nine thousand four hundred and twenty-two

dollars and seventy-six cents, which had been appropriated pursuant to the resolution of the Senate, seven hundred and twenty-four thousand six hundred and three dollars and thirty-seven cents; and there was thereupon paid and distributed to the Eastern Cherokees, per capita, the above amounts, with interest thereon at five per cent from June 12, 1838, the same being paid and accepted under the act of September 30, 1850 (9 Stat. L., p. 556), which provided—

"'That said money shall be paid by the United States and received by the Indians on condition that the same shall be in full discharge of the amount thus improperly charged to the said treaty fund.'

"And under the act of February 27, 1851, which provided—

"'That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore
44 made with the Cherokees. And the said Cherokee Nation shall, on the payment of such sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation, and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees.'

"On the 27th of November, 1851, the Cherokee national council, before the payment of any of said money or making any receipt therefor, passed a formal protest against the treaties of December 26, 1835, and the 6th of August, 1846, and the settlement made under their provisions, using in said protest the following language with reference to the expenses of the removal:

"'Because no allowance is made for the sums taken from the treaty fund for removal to the West, although the charge depended upon precisely the same words in the treaty of 1835 as did the one year's subsistence, and the Senate unanimously decided upon the question submitted to them as arbitrators that the item of subsistence was not a proper charge upon the Cherokee fund. That had been the decision of the Senate about the date of the treaty when that question was specially presented. It was so considered by Mr. Poinsett, Secretary of War, in June, 1838, and his decision was sanctioned by act of Congress, and an appropriation was made for that purpose; but, the estimates being too small by half, the Indian fund was then for the first time seized upon.'

"This protest was transmitted to and received by the Commissioner of Indian Affairs during the month of April, 1852.

"Thereafter the said total amount of $914,026.13 was duly paid and distributed to and among the Cherokees, and the Cherokees executed to the United States the full and final discharge of all claims and demands whatsoever on the United States, as required by the statute aforesaid. This discharge was in the form following:

"'We, the undersigned Emigrant or Eastern Cherokees, do hereby
45 acknowledge to have received from John Drennen, Superintendent Indian Affairs, the sums opposite our names, respectively, being in full of all demands under the treaty of sixth of August, eighteen hundred and forty-six, according to the principles established in the ninth article thereof, and appropriated by Congress per act 30th of September, 1850, and per act 27th of February, 1851, which reads as follows: "And the

said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by treaty to pay to said Cherokee Nation, and except also such money and lands, if any, as the United States may hold in trust for said Cherokees.'"

It will be observed that this payment, divided among 16,231 Eastern Cherokees, to wit, 14,098 in the West and 2,133 in the East, made a per capita only of $56.31, although promised specifically by President Andrew Jackson a per capita payment of one hundred and fifty dollars each (Eastern Cherokees vs. U. S., No. 10386, finding 6).

The payments to the Western Cherokees, who numbered 3,146 persons, in so far as relates to the per capita based upon the balance of the five-million-dollar fund, were as follows:

In 1852	$532,896.90
In 1894	212,376.94

making a total of $745,273.84, excluding interest, thus making a per capita to the Western Cherokees of $236.89.

If in addition to the amount paid to the Eastern Cherokees
46 in 1852, to wit, $914,026.13, there had been paid also the amount of $1,111,284.70, the per capita to the Eastern Cherokees would have been $124.78 less than the amount promised them in President Jackson's letter and about one-half of what the Western Cherokees have actually received as their per capita, under a treaty which was intended to place these people, as joint grantors of the same property, upon exactly the same basis as far as was practicable.

XVI.

Both the Eastern Cherokees and the Western Cherokees strenuously protested against the settlement of 1852 and made repeated demands upon the Government of the United States for settlement from that time forward. Finally, the Western Cherokees were permitted by act of Congress, upon the 25th of February, 1889 (25 Stat. L., 694), to take their claim into the Court of Claims, with right of appeal to the Supreme Court, and a decision was rendered in favor of the Western Cherokees by the Court of Claims November 30, 1891 (27 Ct. Cls., p. 1), and by the Supreme Court of the United States April 3, 1893 (148 U. S., p. 427).

The Western Cherokees, by the fourth article of the treaty of 1846, were to receive a sum equal to one-third the balance of the five-million-dollar fund due the Eastern Cherokees according to the plan laid down in article 4 of the treaty of 1846. The balance which the old settlers actually received under the final judgment of the court, including that received in 1852, was $745,273.84. By way of comparison, it is
47 to be observed that the Eastern Cherokees, if they had received the residuum, of which this sum was estimated to be a sum equal to one-third, would have received three times that amount, or the sum of $2,235,820.52, and, deducting $914,026.13, which was actually paid to them in 1852, would have received a balance of $1,321,794.39, a sum somewhat larger than that awarded in the Slade and Bender accounting, to which reference is hereinafter made.

XVII.

It is further shown, in the language of the court's opinion, in the case of the Eastern Cherokees, No. 10386, Congressional Finding IX, that—

"At the time of the negotiations for the sale of the lands belonging to the Cherokee Nation, known as the 'Cherokee Outlet,' in 1891, the Cherokees again renewed their contention that their five-million-dollar trust fund had been improperly charged with the expense of the removal to the Indian Territory. Accordingly, on the 19th of December, 1891, an agreement was entered into between the Cherokee Nation and the United States for the sale of the Cherokee Outlet, being the agreement referred to and described in the act of March 3, 1893 (27 Stat. L., 640, sec. 10), whereby it was provided, among other things, that—

"'Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its
48 national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised, but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in its favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.' (Senate Ex. Doc. No. 56, Fifty-second Congress, first session; 27 Stat., 643.)

"Congress on March 3, 1893 (27 Stat. L., 640), ratified the Cherokee agreement, and on the same day (27 Stat. L., 643) appropriated five thousand dollars for the employment of experts to render a complete account of moneys due the Cherokees as required in the fourth subdivision of article two of said agreement. Under this provision Messrs. James A. Slade and Joseph T. Bender were appointed commissioners to render the account referred to in such agreement. The commissioners made their report, bearing date April 28, 1894, whereby, among other things, they reported that 'The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement, and the result of the finding is submitted in the following schedule:

"'Under the treaty of 1835: Amount paid for removal of Eastern

Cherokees to the Indian Territory, improperly charged to the treaty fund, $1,111,284.70, with interest from June 12, 1838, to date of payment.'"

49 XVIII.

The accounting provided for was to be made through an "agent appointed by authority of the national council."

Hon. R. F. Wyly was so appointed. The accounting was made to him, and by him submitted to the Cherokee National Council. The accounting was accepted by the Cherokee National Council December 1, 1894, and Hon. R. F. Wyly, having performed his duty, was discharged from further service. The accounting provided by law having been made by James A. Slade and Joseph T. Bender, on April 28, 1894, they were discharged from further service, their labors having been completed.

The entire transaction was made in a usual, orderly, methodical manner, strictly in accordance with the law of March 3, 1893, and in accordance with the terms of the said Cherokee agreement, entered into on the 19th day of December, 1891, and ratified by Congress on March 3, 1893.

In this agreement the United States deliberately omitted any right of appeal against this award to be reserved to the United States, for the reason, probably, as stated by the United States commissioners making the treaty, to wit:

"Because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been
50 done properly, no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for the legal discharge of old ones." (Sen. Doc. 215, 56th Cong., 1st sess., p. 44.)

On February 6, 1892, Hon. Thomas J. Morgan, Commissioner of Indian Affairs, quotes this language of the United States commission, in his report to the Secretary of the Interior, and says:

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it. In order to prepare a statement of this kind, it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant and assistants, and in the draft of a bill for the ratification of the agreement herewith enclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose." (Sen. Doc. 215, 56th Cong., 1 sess., p. 41.)

On February 25, 1892, Hon. George H. Shields, Assistant Attorney-General, in his report to the Secretary of the Interior, upon this proposed "complete" account, takes the ground that the terms of agreement are sufficiently clear to secure such an accounting as should be a full and "final settlement" of all claims and accounts of these Indians against the United States, and puts the following construction on the meaning of this agreement:

"The fourth and next provision of article 2 of the agreement required the United States to render to the Cherokee Nation a complete account-

ing of all moneys agreed to be paid to the Indians which they may
51 be entitled to under any treaty or act of Congress since 1817. And if said accounting is satisfactory, Congress shall make the necessary appropriation to pay the same; but if the accounting is not satisfactory, then the Cherokees are to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

"I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting." (Sen. Doc. 215, 56th Cong., 1 sess., p. 55.)

Upon this opinion of the Assistant Attorney-General that the accounting under the terms of the agreement would secure a full and "final" settlement, or that a full and "final" settlement should be obtained, and that the terms of the agreement were sufficiently clear to secure such an accounting, Congress by its act of March 3, 1893 (27 Stat., 640), referring to the Cherokee agreement, said:

"Which said agreement, set forth in the message of the President of the United States communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress * * * and said agreement is hereby ratified by the Congress of the United States * * * and the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States."

The same act further provides (27 Stat., 643) that—

"The sum of $5,000, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary
52 of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement."

Under this authority of the statute directing the complete account to be rendered, and appropriating money to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ expert persons, the Commissioner of Indian Affairs, in pursuance of the duty imposed on him by law, employed James A. Slade, formerly of the Department of State, and Joseph T. Bender, both able and competent accountants, the latter having for a long time been in the finance division and in charge of said division of the Indian Office, and thoroughly familiar with and experienced in the financial and accounting methods of the Indian Bureau, and at present chief of the Indian division of the Department of the Interior.

On April 28, 1894, the "complete" account provided for was rendered.

On December 1, 1894, the Cherokee national council accepted these said accounts, and requested the Secretary of the Interior "to so notify the Congress of the United States and ask for an immediate appropriation in accordance with the act of March 3, 1893."

On January 7, 1895, the Secretary of the Interior, under the seal of his office, with unusual formality, certified to Congress a true and literal copy of the award, together with the act of acceptance of said award by the Cherokee national council, in the following language:

53 DEPARTMENT OF THE INTERIOR,
Washington, D. C. January 7th, 1895.

SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress, approved March 3, 1893 (27 Stat., 643), a certified copy of "a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect," prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy with an act of the Cherokee national council accepting such account.

Very respectfully,

HOKE SMITH, *Secretary.*

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.
(Senate Doc. 215, 56 Cong., 1 sess., p. 71.)

XIX.

The House of Representatives and the Senate, with the approval of the President of the United States, in the act of March 2, 1895 (28 Stats. L., 795), referred to

"The account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1836, 1846, 1866, 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect" (as having been) "prepared in accordance with the provisions of the act of March 3, 1893, and reported to Congress in House Executive Document No. 182, 53d Congress, 3d session." (Sen. Doc. 215, 56 Cong., first session, p. 12.)

54 Congress thus concluded that the Slade-Bender accounting had been rendered in the manner agreed upon and authorized by Congress.

And as was said by the Court of Claims in the case of the Eastern Cherokees against the United States (Congressional 10386, Finding X):

"The account as thus stated by Messrs. Slade and Bender was rendered to the Cherokee Nation and duly accepted by act of their national council in the manner and form provided in the agreement, and no suit has been brought by the Cherokee Nation against the United States in the Court of Claims, charging that such account was incorrect and unjust."

XX.

Your petitioners charge that the defendant, the Cherokee Nation, through its corporate authorities, now claims the fund sought to be

recovered by your petitioners, as due to the Cherokee Nation as a political body, on the ground that the accounting of moneys due to the Cherokee Nation was provided by the agreement of 1891 to be rendered to the Cherokee Nation, and that it is not due to the Eastern Cherokees.

Your petitioners call attention to the fact that the term "Cherokee Nation" has been variously used in the treaties and laws relating to the Cherokees to represent not only the Cherokee Nation as a political body, but also to represent the Cherokee people composing its citizenship in whole or in part. For example, the term "Cherokee Nation" was used in the treaty of 1835–36, although the Cherokee Nation there referred to was composed exclusively of the Eastern Cherokees. The
55 "Cherokee Nation" of the treaty of 1833 comprised exclusively the Western Cherokees.

The term "Cherokee Nation," as used in the 11th article of the treaty of 1846, was properly interpreted by the Senate to mean the Eastern Cherokees on the one part and the Western Cherokees on the other part, and the Senate, as umpire under the reference, found that interest should be allowed upon the sums due the Eastern Cherokees and upon the sums due the Western Cherokees, at the rate of five per cent per annum from June 12, 1838, until paid. This construction by the Senate, as hereinafter shown, was confirmed by Congress and by the Supreme Court of the United States in various instances.

The term "Cherokee Nation" in the acts of Congress of September 30, 1850 (14 Stat. L., 536), and of February 27, 1851 (14 Stat. L., 572), was used by Congress in making the appropriations of those dates, although the term was intended to describe the Eastern Cherokees exclusively, and the sums so appropriated were paid to the Eastern Cherokees per capita exclusively, in accordance with the opinion of Attorney-General Crittenden of April 16, 1851 (5 opinions, 320), holding that the term "Cherokee Nation" in these acts referred exclusively to the Cherokees described in the 9th article of the treaty of 1846, and declaring that payment per capita to the Eastern Cherokees was payment to the Cherokee Nation, but that payment to the national authorities might not be so. The Cherokee Nation accepted this construction of the
56 Attorney-General as correct and proper, and entered no objection whatever to the payment made in accordance with the opinion.

XXI.

At the time of the making of the agreement of December 19, 1891, the Eastern Cherokees residing in the Indian Territory were not maintaining an organization as such. After the rendition of the award of Slade and Bender and its submission to Congress by the Secretary of the Interior, the corporate authorities of the Cherokee Nation failed to prosecute the award before the committees of Congress. This neglect resulted in an item on the legislative appropriation act of March 2, 1895 (28 Stats. L., 795), referring this adjudicated claim for review to the Attorney-General of the United States. The corporate authorities of the Cherokee Nation by gross neglect allowed this adjudicated claim so referred to the Attorney-General to be passed on by him without any appearance whatever, and an opinion of the Attorney-General was rendered adverse to the rights

of your petitioners, because, as your petitioners believe, of such neglect on the part of the corporate authorities of the Cherokee Nation.

No record anywhere appears of any services rendered by the said Cherokee Nation in prosecuting the rights of your petitioners in the matter of the award referred to.

On June 28, 1898, by an act of Congress commonly known as the "Curtis Act" (30 Stats. L., 495) the Cherokee Nation was dismantled. Its judiciary was abolished. Its county government was set aside. Its
57 right to pass laws for the government of persons and property within its own borders was taken away. The right to enforce its own laws was denied. The right of enforcement of its laws in the courts of the United States was forbidden. It was further provided as follows:

"SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments, or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under the direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

In February, 1900, the Cherokee Nation having made no progress whatever in the collection of the moneys due the Eastern Cherokees under this award, the Eastern Cherokees residing in the Cherokee Nation called a general convention, and organized in pursuance of their common law right, and under the authority of the second article of the treaty of 1846, providing that—

"All party distinctions shall cease except so far as they may be necessary to carry out this convention or treaty. * * *

"Full authority shall be given by law to all or any portion of the Cherokee people peaceably to assemble and petition their own government or the Government of the United States for the redress of grievances and to discuss their rights."

The general convention of the Eastern Cherokees organized on February 14, 1900, and called a further general convention for April
58 3, 1900. On this last date a permanent council was established and steps were taken to prosecute the rights of the Eastern Cherokees and to employ counsel.

On September 4, 1901, a further convention or council was held by the Eastern Cherokees, confirming the steps previously taken for the prosecution of their rights. Under the authority of this organization and cooperating with a similar organization upon the part of the Eastern Cherokees residing east of the Mississippi River, who had already presented their claim to the Congress of the United States (Sen. Doc. 143, 54th Cong., 1st sess.), the Eastern Cherokees presented to Congress proper memorials, setting up their rights in the premises as follows: March 12, 1900, Sen. Doc. 215, 56th Cong., 1st sess.; April 11, 1900, Sen. Doc. 282, 56th Cong., 1st sess.; April 21, 1900, Sen. Doc. 305, 56th Cong., 1st sess.; April 23, 1900, Sen. Doc. 308, 56th Cong., 1st sess.; May 22, 1900, Sen. Doc. 392, 56th Cong., 1st sess.; December 11, 1900, Sen. Doc. 35, 56th Cong., 2d sess.

On February 20, 1901, under the urgent demands of the Eastern

Cherokees, through the organization aforesaid, the Senate of the United States passed a resolution committing to the Court of Claims under the Bowman Act Senate bill No. 3681 of the 56th Congress, 1st session, which had been introduced for the purpose of providing a settlement of the very matter now the subject of this suit. The Cherokee Nation intervened in said suit of the Eastern Cherokees against the United States (No. 10386), and the Court of Claims decided the facts in said case on April 28, 1902.

59 Upon the findings of fact made by this honorable court in the case referred to, the Eastern Cherokees demanded of Congress immediate payment of the money due. In the meantime, as your petitioners are informed and charge, the Cherokee Nation again set up the claim that the award of Slade and Bender having been rendered to the Cherokee Nation the money due under such award was due and payable to the Cherokee Nation as a body politic. The House of Representatives by resolution of December 16, 1902, referred the demand of the Eastern Cherokees to the Attorney-General of the United States for an opinion as to whether or not the said award and the finding of the court in the case referred to was res adjudicata. The attorneys of the Eastern Cherokees appeared and presented this matter before the Department of Justice, and their contention was controverted by the principal chief of the Cherokee Nation, who claimed that the amount found due by Slade and Bender was due to the Cherokee Nation as a body politic and to all of the citizens thereof, and not to the Eastern Cherokees, your petitioners.

The Attorney-General declined to render an opinion, as requested by the resolution of the House of Representatives (H. R. Doc. 309, 57th Cong., 2d sess.), but reported to Congress that the Cherokee Nation asserted a right to this claim adverse to the claim of the Eastern Cherokees, and advised that the matter should be litigated in court. Thereupon the Congress of the United States passed the act hereinbefore set

60 forth in Paragraph IV of this petition, authorizing the institution of this suit, and requiring that both your petitioners and the Cherokee Nation be made parties thereto.

XXII.

In said suit, No. 10386, decided by this honorable court on April 28, 1902, in which the Cherokee Nation, as hereinbefore alleged, intervened by petition, claiming this money for the nation, the court found—

"But the Cherokees who removed to the Indian Territory after the signature of the treaty of December 29, 1835, as well as those who remained permanently east of the Mississippi, continued to be popularly known as the Eastern Cherokees, and all Eastern Cherokees by virtue of their individual rights as members of the Cherokee Nation are the parties claimant in this suit."

XXIII.

In the award of Slade and Bender, hereinbefore referred to, were embraced four items, to wit:

(a) The value of certain lands under the treaty of 1819 (with interest from February 27, 1819, until paid)	$2,125.00
(b) Amount paid for removal of the Cherokees to the Indian Territory improperly charged to the treaty fund under the treaty of 1835 (with interest from June 12, 1838, until paid)	$1,111,284.70
(c) Amount received by receiver of public moneys at Independence, Ks., under the treaty of 1866 (with interest from January 1, 1874, until paid)	$432.28
(d) Interest on $15,000 of Choctaw funds applied in 1863 to relieve all indigent Cherokees under act of Congress of March 3, 1893	$20,406.25

61 The Eastern Cherokees make no claim to any of these four items except the second, to wit, the amount of $1,111,284.70, improperly charged to the five million dollar fund. As to the other three items of this award, the right of the Cherokee Nation as a nation to maintain a suit and receive an award of judgment is not denied by the Eastern Cherokees.

XXIV.

FACTS RELATING TO INTEREST.

By Article II of the treaty of 1846, the question whether the Cherokee Nation should be allowed interest on whatever sums might be found to be due the nation, and from what date and at what rate per annum, was left to the Senate of the United States as umpire to decide.

On September 5, 1850, the Senate, acting as umpire, under this article, passed the following resolution:

"Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid." (Eastern Cherokees vs. U. S., No. 10386, Finding 7.)

Congress by numerous acts confirmed and validated this decision of the Senate of the United States.

Congress ratified this resolution of the Senate in the following acts; to wit:

On September 30, 1850, in appropriating $189,422.76 to the Cherokees Congress used the following language:

62 "And that interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate on fifth September, 1850" (9 Stats., 556).

On September 30, 1850, in making an appropriation for the Western Cherokees of $532,896.90, the following language was used:

"And that interest be allowed and paid upon the above sums due, respectively, to the Cherokees in pursuance of the above-mentioned award of the Senate under the reference contained in the said 11th article of the treaty of sixth August, 1846" (9 Stats., 556).

Congress on February 27, 1851, appropriated to the Cherokee Nation the sum of $724,603.37, using the following language:

"And interest on the above sum at the rate of five per centum per

annum from the 12th day of June, 1838, until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated; but no interest shall be paid after the first of April, 1851, if any portion of the money is then left undrawn by the said Cherokees" (9 Stats., 572).

The Western Cherokees, being dissatisfied with the proposed settlement of 1851, sued the United States and recovered judgment. The Supreme Court held that the sum then found due the Western Cherokees was less than should have been found by the amount of $212,376.94, and said:

"It appears to us that the decision of the Senate in respect of interest is controlling, and that therefore interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated" (148 U. S., 478).

63 Interest was calculated upon this judgment at the rate of five per cent from June 12, 1838, to the date of rendition of judgment, June 6, 1893 (54 years, 9 months, and 21 days), making a sum of $583,830.11 for interest, which, together with the principal, made a total of $800,386.31, which was duly appropriated by Congress on August 23, 1894 (28 Stats., 451).

The interest upon the principal found due to the Western Cherokees having been calculated only to June 6, 1893, and said money not having been paid until March 28, 1896, and the resolution of the Senate aforesaid having declared that interest was due on sums found due to said Indians until paid, a demand was made by the Western Cherokees upon the Congress of the United States for the balance of the interest due, to wit, $29,850.74, which was duly appropriated on March 3, 1889, in the the following language:

"That the sum of twenty-nine thousand eight hundred and fifty dollars and seventy-four cents, being the interest at five per centum per annum from June sixth, eighteen hundred and ninety-three, to March twenty-eighth, eighteen hundred and ninety-six, due the Western Cherokee Indians under the award of the United States Senate of September fifth, eighteen hundred and fifty, on the principal sum of two hundred and twelve thousand three hundred and seventy-six dollars and ninety-four cents found to be due them under the decision of the Supreme Court of June 6th, eighteen hundred and ninety-three, is hereby appropriated, to be paid to the authorized agent of the counsel of the Western Cherokee Indians." (Act March 3, 1899, 30 Stats., p. 1235.)

64 The United States, in the light of this unbroken line of precedent, in rendering the account of the Cherokees under the agreement of 1891, ratified by act of Congress March 3, 1893, found, and were obliged to find, that the amount of $1,111,284.70 was due and payable, "with interest from June 12, 1838, to date of payment."

The Supreme Court, in passing on the scope of the Senate resolution of Sept. 5, 1850, in the Western Cherokee case above referred to, said:

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed at the rate of 5 per cent per annum upon the sum found due the Western Cherokees from June 12, 1838, until paid. As before stated, our conclusion is that the sum then found due was less than should have been found by the amount of $212,376.94.

"Under section 1901 of the Revised Statutes no interest can be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, and in Tillson vs. United States (100 U. S., 43) it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself. That determination was arrived at as prescribed, was accepted as valid and binding upon the *the* United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest (9 Stat. L., 556, c. 91).

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due it appears to us that the decision of the Senate in respect of interest is controlling, and that therefore interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated." (148 U. S. Reports, 478.) (Decided December 3, 1893.)

65

XXV.

Your petitioners therefore charge that the Eastern Cherokees are in like manner entitled to interest at five per cent per annum from June 12, 1838, until paid, upon the sum which should have been paid to them in 1852, but was wrongfully withheld.

The annual interest upon the sum of $1,111,284.70 amounted to $55,564.23½, and should have been paid to your petitioners at the end of each year when the same fell due, or in default of such payment it should have been invested under the statute of the United States which was passed by Congress on the 11th day of September, 1841 (5 Stats. L., 465, sec. 2), which still remains in full force upon the statutes of the United States as section 3659, R. S., as follows, to wit:

"SECTION 3659. All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum."

Your petitioners insist and charge that the income which had accrued on the 12th day of June, 1843, should have been thus invested, and that each of the sums falling annually due thereafter should have been likewise invested, at not less than five per centum per annum, for the benefit of your petitioners.

XXVI.

Wherefore, in view of all the foregoing allegations of this petition, your petitioners respectfully show, state, and charge that—

66 (1) The findings of Slade and Bender, hereinbefore fully set out, constitute an arbitration and award by which both the United States and your petitioners are bound, and therefore that the United States is indebted to your petitioners in the principal sum of $1,111,284.70, together with interest thereon from June 12, 1838, as more particularly hereinafter set forth.

Your petitioners further charge that in the event the court holds that the accounting of Slade and Bender is not an award, conclusive and binding upon the United States and your petitioners, nevertheless the United States is indebted to your petitioners in the sum of $1,111,284.70, together with interest as hereinafter more particularly set forth, for the reason as stated in finding 5 in the case of the Eastern Cherokees against the United States (Congressional, 10386); that the court adjudged that the sum of $1,111,284.70 had been charged against the five million dollar fund on account of the removal, and which charge your petitioners aver was unlawfully made.

Your petitioners further charge in the alternative, that the United States is indebted to them in the sum of $1,761,457.27, with interest thereon, as hereinafter more particularly set forth, for the following reasons, to wit: That the Eastern Cherokees emigrated themselves, and by article 8 of the treaty of 1835–36 the United States had no right to take credit for such removal and subsistence in excess of the rate of $53.33 per capita for each of the said Cherokees, numbering 16,957 persons, found by the Supreme Court of the United States to have been
67 removed (Western Cherokees against the United States, 147 U. S., 427), being the sum of $904,316.81. The United States, in fact, took credit for the sum of.... ..... $2,952,196.26

(Sen. Doc. 215, 56th Cong., 1st sess., p. 87.)

on account of removal and subsistence, reimbursing on February 21, 1851, the sum of	$96,999.42	
and on September 39, 1850.....	189,422.76 (ibid.)	
A total of.....	$286,422.18	$286,422.18
Leaving a balance of.....		$2,665,774.08
When only entitled to a credit as above set forth on account of removal and subsistence in the sum of.....		$904,316.81
Leaving a balance due the Eastern Cherokees of.		$1,761,457.27

Your petitioners therefore charge in the alternative that instead of the sum of $1,111,284.70 found by Slade and Bender, the amount of $1,761,457.27 is due them by the United States with interest, as hereinafter more particularly set forth.

(2) If the said accounting of Slade and Bender should be held by the court to constitute an award by which both the United States and your petitioners are bound, then the statement of that award that interest is due on said amount from June 12, 1838, does not preclude your petitioners from but compels your petitioners to insist on demanding judgment upon a calculation of interest in the manner prescribed by law.

68 Your petitioners therefore charge that interest should be calculated upon the principal sum found due them at the rate of five per cent per annum from the 12th day of June, 1838, until paid.

(3) They further charge that the income which had accrued up to June 12, 1842, upon whatever principal sum may be found by the court due your petitioners should bear interest from June 12, 1842, at the rate of not less than five per cent per annum, until paid, in pursuance of the statute of September 11, 1841 (5 Stat. L., 465).

(4) They further charge that they are entitled to recover interest at the rate of five per cent per annum, until paid, upon the annual income

accruing upon whatever principal sum is found by the court to be due them, and which was payable on June 12, 1843, and upon the annual income so accruing on June 12th of each succeeding year, from the dates when severally due until the time when such several annual incomes so due shall have been paid.

That is to say:

Your petitioners charge that they are entitled to receive—

a. The principal sum unlawfully withheld.

b. The interest on said principal sum from June 12, 1838, until paid.

c. The interest on four years' income on the principal sum for the years 1839, 1840, 1841, 1842, from June 12, 1842, until paid.

d. The interest on the annually accruing income on such principal sum from the dates when so due and payable, beginning with June 12,
69 1843, and extending to the present, until such annual income for such years severally referred to shall have been paid.

(5) That the Cherokee Nation, as a political body, is not entitled to maintain the action which is the subject of this petition, first, because the Cherokee Nation is not the owner of this claim; second, because the Cherokee Nation, if ever in any capacity the representative of your petitioners, is not now their representative; third, because the Cherokee Nation has been dismantled as a body politic, and has no authority either to receive or to disburse funds, and because the Cherokee Nation may be actually nonexistent when judgment is finally rendered in this cause; fourth, because the Cherokee Nation, if ever the representative of your petitioners in any capacity of trust or otherwise, has forfeited whatever rights it may have had as such representative by laying claim to this fund as the property of the nation itself and not as the property of your petitioners and in contravention of the rights of your petitioners; fifth, because the Cherokee Nation, if ever the representative in any capacity of your petitioners, has, by its gross laches and unpardonable negligence, forfeited all right or claim to represent your petitioners in the matter of this claim; sixth, because it has been, by this honorable court in the case of The Eastern Cherokees vs. The United States, No. 10386, adjudged that the parties claimant in the matter of this claim were the Eastern Cherokees and not the Cherokee Nation, and, finally, because the Congress of the United States, being fully advised in the premises, has
70 authorized by special act your petitioners to appear in this honorable court and institute this suit for the protection and adjudication of their own rights, who have, therefore, full capacity to institute and maintain this action in their own behalf and expressly as against the Cherokee Nation.

PRAYERS.

In consideration of the premises, your petitioners respectfully pray—

1st. That under and by virtue of the act of Congress hereinbefore cited they have leave to file this their petition.

2d. That under and by virtue of the said act of Congress the Cherokee Nation be made a party defendant hereto, and that the court direct the issuance of its process for that purpose and require the said defendant, the Cherokee Nation, to appear and answer this petition, or otherwise defend within sixty days from the date of its filing.

3d. That your petitioners have a judgment of this court declaring that

the account rendered by Messrs. Slade and Bender, hereinbefore particularly set forth, constitutes an award binding both upon the United States and your petitioners, and that your petitioners have judgment accordingly; or, in the alternative, that if this honorable court should hold said finding of Slade and Bender not to be an award binding upon the United States and your petitioners, your petitioners have judgment against the United States for the amount found to have been unlaw-
71 fully withheld from your petitioners, and that in either event the judgment in favor of your petitioners shall include interest computed upon the principal sum in accordance with the allegations of Paragraph XXVI.

Your petitioners pray also for general relief.

EASTERN CHEROKEES,
By ROBT. L. OWEN,
Attorney.

R. V. BELT,
ROBT. L. OWEN,
SCARRETT & COX,
W. T. CRAWFORD,
Attorneys.

W. H. ROBESON,
M. C. BUTLER,
Of Counsel.

THE NORTHERN JUDICIAL
DISTRICT OF INDIAN TERRITORY, *ss:*

This day personally appeared before me the undersigned authority, Frank J. Boudinot, and having been first sworn in due form of law, deposes as follows:

I am one of the three members of the Executive Committee of the Council of the Eastern Cherokees; I have carefully read the foregoing petition, in company with my fellow committeemen, David Muskrat and Daniel Gritts, at whose request I make this verification. The allegations of the foregoing petition are true to the best of my knowledge, information, and belief.

FRANK J. BOUDINOT.

Subscribed and sworn to before me this day of March, 1903.

Notary Public.

My commission expires

72 DISTRICT OF COLUMBIA,
City of Washington, ss:

This day personally appeared before me, the undersigned authority, Robert L. Owen, and having been first sworn in due form of law, deposes as follows:

I am one of the attorneys representing the petitioners, the Eastern Cherokees, and have carefully read the foregoing petition. The allegations thereof are true to the best of my knowledge, information, and belief.

ROBERT L. OWEN.

Subscribed and sworn to before me this 13th day of March, 1903.

[SEAL.]

L. M. FOX,
Notary Public.

My commission expires May 10, 1907.

THE CHEROKEE NATION
v.
THE UNITED STATES. } No. 23199.

THE EASTERN CHEROKEES
v.
THE UNITED STATES. } No. 23214.

THE EASTERN AND EMIGRANT CHEROKEES
v.
THE UNITED STATES. } No. 23214.

V.—Motion to consolidate and to require the production of authority, and order thereon, filed January 7, 1904.

Come now the defendants, by their Attorney-General, and show and exhibit unto the court that under the provisions of section 68 of the act of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation and for the disposal of the town sites therein, and for other purposes" (32 Stat. L., 716), and under the provisions of the act of March 3, 1903, entitled "An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1904, conferring jurisdiction upon this court to hear and determine certain claims alleged to exist on the part
73 of the Cherokee Nation and various bands or tribes thereof against the United States, there has been filed in this court the suit of the Cherokee Nation and docketed as No. 23199; the suit of the Eastern Cherokees and docketed as No. 23214; the suit of the Eastern and Emigrant Cherokees, docketed as No. 23212.

And the defendants further show and exhibit to the court that the causes of action in all of the aforesaid suits relate to the same subject-matter and can be most conveniently and expeditiously determined by a consolidation of the three suits.

And the defendants further show and exhibit unto the court that under the acts of Congress first above referred to it is made the duty of the court to determine which, if any, of the parties plaintiff are entitled to the money sued for, and it is also made the duty of the court by such orders or process as the court may deem proper to require all parties in interest to appear and submit themselves to the jurisdiction of the court, in order that the cause at issue may be fully determined.

Now, therefore, in consideration of the premises, the defendants pray:

I. That the aforesaid causes of action be consolidated and heard together as one cause.

II. That all the parties plaintiff in the above-entitled causes be required, by order of this court, to submit to the court for its inspection, approval, or disapproval the powers of attorney, or such other authority upon which the claimants, or the attorneys thereof, rely for authority to present their claims in this court under the aforesaid acts of Congress.

LOUIS A. PRADT,
Assistant Attorney-General.

GEO. H. GORMAN,
Special Attorney.

74 ORDER OF COURT.

It is ordered on the within motion that the claimants in the several suits, to wit, The Cherokee Nation, No. 23199; The Eastern Cherokees, No. 23214, and the Eastern and Emigrant Cherokees, No. 23212, be required to interplead, and that the above-entitled cases be consolidated and brought to trial as one case without prejudice to the several rights of the parties claimant;

And it is further ordered that upon the hearing of the several causes on the merits, or at such other time as the court may direct, the attorney appearing for the Cherokee Nation, the Eastern Cherokees, and the Eastern and Emigrant Cherokees be required to submit to the court the power of attorney or other authority upon which they rely to bring said suit, and to establish by proof or argument or otherwise, as the court may direct, the sufficiency of such power of attorney or other authority to bring into court the respective parties plaintiff.

March 7, 1904.

BY THE COURT.

75 THE CHEROKEE NATION vs. THE UNITED STATES. } No. 23199.

VI.—The intervening petition of the Eastern Cherokees in the case of The Cherokee Nation vs. The United States, No. 23199, filed under the order of the court—filed February 14, 1905.

Now come the Eastern Cherokees, under the direction of the court, to interplead in the case of The Cherokee Nation vs. The United States, No. 23199, and showing to the court that they have heretofore instituted an independent suit against the United States and the Cherokee Nation, being No. 23214, for the recovery of the certain item hereinafter referred to, the right to a recovery for which is in dispute between themselves and the Cherokee Nation, and protesting that in said suit the controversy between themselves and the United States and the Cherokee Nation regarding said item is fully set out and should be determined, respectfully state that the Eastern Cherokees are in accord with the Cherokee Nation as follows:

"That the United States is in duty bound to pay the amount found due in the account rendered by the United States April 28,

76 1894."

The Eastern Cherokees agree that the first, third, and fourth items found due by the United States in the account rendered are due the Cherokee Nation as a body politic.

The Eastern Cherokees deny that the second item, to wit, $1,111,284.70, with interest at five per cent from June 12, 1838, to date of payment, is due the Cherokee Nation as a body politic, but allege on the contrary that that fund is the balance of the amount due under the 9th article of the treaty of 1846 and the 15th article of the treaty of 1835 to the persons therein described, to wit, to the Eastern Cherokees per capita; that the Cherokee Nation, in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred

to, and for their exclusive use and benefit, and that if it had collected such money such money would be in its hands an implied trust for the benefit of the equitable owners, to wit, the Eastern Cherokees.

The Eastern Cherokees for further answer state that Slade and Bender (page 84 of the record No. 23214) distinctly state, in making a tabulation of the balance due under the 9th article of the treaty of 1846, as follows:

Balance to be distributed per capita	$2,025,310.83
Deduct amount actually distributed as already explained	914,026.13
Balance due	1,111,284.70

The Eastern Cherokees for further answer state that the Cherokee national council itself, on December 7, 1900, in an act approved on that day by Hon. Thomas M. Buffington, principal chief of the Cher-
77 okee Nation, heretofore filed in this court, expressly conceded the right of the Eastern Cherokees in the following language:

"Be it further enacted, that all moneys which may be collected belonging to the five-million-dollar treaty fund of 1835 shall be paid out per capita when collected to the persons entitled thereto, as set forth in the 9th article of the treaty of 1846."

The Eastern Cherokees, further answering, pray that their briefs, arguments, and reply briefs, in the case of The Eastern Cherokees vs. The United States, No. 23214, be considered as filed in this case now consolidated under the order of court of March 7, 1904.

Respectfully submitted.

OWEN AND BELT,
ROBERT V. BELT,
Attorneys of Record.

February 14, 1905.

WILLIAM H. ROBESON,
Of Counsel.

78 THE CHEROKEE NATION
vs.
THE UNITED STATES. } No. 23199.

III.—*Replication of the Cherokee Nation to the intervening petition of the Eastern Cherokees in the case of The Cherokee Nation vs. The United States, filed February 14, 1905.*

Now comes the Cherokee Nation and for replication to so much of the intervening petition of the Eastern Cherokees as it is advised should be answered, says:

1. It denies that the Cherokee Nation in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred to, and for their exclusive use and benefit; and further denies that if it had collected or hereafter shall collect such moneys, the same would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise.

2. The Cherokee Nation denies that any such act of the Cherokee national council as is referred to and described in said intervening petition,

ever was enacted into law, but on the contrary says that the resolution of the Cherokee national council referred to was expressly disapproved by the President of the United States in the exercise of his supervisory powers under the law in such respect provided and hence never had any validity.

FINKELNBURG, NAGEL AND KIRBY,
EDGAR SMITH,
Attorneys for the Cherokee Nation.

79 THE EASTERN AND EMIGRANT CHEROKEES
v.
THE UNITED STATES. } No. 23212.

VIII.—Intervening petition of the "Eastern Cherokees," filed under order of the court February 14, 1905.

Now come the "Eastern Cherokees," having the status of a band, and under the express authority of the act of Congress of March 3, 1903, authorizing said "Eastern Cherokees to prosecute" suit against the United States, "through attorneys employed by their proper authorities," such authority having heretofore been filed in this honorable court, and respectfully state that the Eastern Cherokees, under the authority of the act aforesaid, have heretofore brought suit under the title of the Eastern Cherokees against the United States, No. 23214; that the suit brought under the caption of The Eastern and Emigrant Cherokees vs. The United States, No. 23212, is brought on behalf of certain individuals who claim to be Eastern Cherokees or Emigrant Cherokees, but who are not authorized to bring suit under the act of Congress of March 3, 1903, or under any other act. The Emigrant Cherokees are Eastern Cherokees who have emigrated to the Cherokee Nation in Indian Territory, called by a local epithet. The Eastern Cherokees intervening by this petition are not informed as to the right of the individuals bringing suit under the designation of the Eastern and Emigrant Cherokees, in suit No. 23212, to be designated as Eastern and Emigrant Cherokees, there being
80 no proper proof submitted beyond the claim of the individuals themselves. They therefore deny that such persons are Eastern Cherokees, and they deny that such persons have any right to bring suit under the act of March 3, 1903; but allege on the contrary that the Eastern Cherokees, with the authority to bring suit in this honorable court as a band or bands, are already in court as one band, by attorneys employed by the proper authorities of the Eastern Cherokees of Indian Territory and the Eastern Cherokees east of the Mississippi, who have heretofore by their proper authorities employed counsel to represent the Eastern Cherokees as a body.

Your intervenors respectfully allege that there is no occasion for the bringing of the suit of The Eastern and Emigrant Cherokees vs. The United States, No. 23212, because the rights of the Eastern Cherokees have been fully set up in the manner provided by the statute in the case of The Eastern Cherokees vs. The United States, No. 23214, while the case of The Eastern and Emigrant Cherokees vs. The United States, No. 23212, is not brought in pursuance of any statute, and has no further

right upon the record of this honorable court than then thousand similar suits might have, if each individual Eastern Cherokee should bring his independent action, which was not contemplated by Congress and is not authorized by law.

Respectfully submitted.

OWEN AND BELT,
ROBERT V. BELT,
Attorneys of Record.

WM. H. ROBESON.

February 14, 1905.

81 THE EASTERN AND EMIGRANT CHEROKEES
vs.
THE UNITED STATES. } No. 23212.

IX.—Answer to intervening petition of the Eastern Cherokees in the above cause claiming to have been filed by order of court February 14, 1905.

1. The Eastern and Emigrant Cherokees in this cause number five thousand five hundred persons, more or less, partly in communities, and partly scattered in North Carolina, Georgia, and Tennessee—citizens of the States in which they reside, and many of them in the Indian Territory—wards of the nation, and in Missouri; not claiming to be organized as a band, but each having an individual financial interest in the subject-matter of this suit, either personally or through their ancestors as Cherokees under the treaties of 1835 and 1846, who were owners of the land, the sale of which constituted the Five Million Fund.

82 2. This suit is brought under authority granted by acts of Congress of March 3, 1903, and of July 1, 1902, allowing the Court of Claims to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, they having previously intervened in suit No. 10386, Congressional, for a finding of facts with reference to the same subject-matter, and appeared before Congress by their attorneys for the enactment of special legislation to enable claimants to litigate their suit, said enactment having been narrowed somewhat by the influence of these intervenors in their own interest.

3. It is brought on the behalf of individual claimants because the treaties stipulate that the money, when paid, shall be paid to the individuals per capita, and because these individuals for the most part are citizens and not required to bring suits under sections 2103 and 2106 U. S. R. S., and because there is no band of Eastern Cherokees distinct as such, either in the States east or in the Indian Territory, the so-called Eastern Band of North Carolina Cherokees having been reduced to a small radius, and for purposes of business formed into a corporation and comprising only a small portion of the Cherokees in the States; while the Eastern Cherokees in the Indian Territory have no separate exist-

83 ence as a band or tribe, but are very largely incorporated in the so-called Cherokee Nation, which will expire by limitation on the 4th of March, 1906.

4. The Eastern and Emigrant Cherokees, designated in this suit, are Cherokees residing in States east of the Mississippi River and portions of their families, Cherokees who have removed west to the Indian Territory who for many reasons have not been incorporated into "The Nation," so called, but all of Cherokee blood, and whose designation "Eastern and Emigrant Cherokees" is an old established one, and will be found on nearly all of the papers designating reservations of the Cherokees east, and are the persons whose lands were sacrificed in the treaties of 1828 and 1835 for their removal west.

5. The parties herein brought their independent suit before the filing of the suit of these intervenors, as will be seen by the numbers of the two cases as set forth by them, and without having been informed that it was necessary to secure permission of these intervenors to bring said suit.

6. The parties to this suit deny either that they are represented by, or that they have authorized representation by, the intervenors herein or their attorneys. They have filed this suit because they are not so represented for the most part and desire to be placed on the new pay rolls that they may receive their pro rata, having received nothing
84 from the $8,500,000 paid for the Oklahoma strip, or for any of the sales of western lands.

7. We deny that these intervenors are in court in strict accordance with either of the statutes referred to, or that there has ever been any act of union between the Eastern or North Carolina Cherokees and the Eastern Cherokees in the Indian Territory, or that they have, since the removal west of the latter, acted together as a band, or that the parties as a whole in this intervention have any status as a band. The court has allowed, under the act, all of the parties in interest to come in, and has requested them to interplead.

BELVA A. LOCKWOOD,
Attorney for Eastern and Emigrant Cherokees.

85 In the Court of Claims of the United States, Term A. D. 1904–1905.

THE CHEROKEE NATION *vs.* THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN & EMIGRANT CHEROKEES *vs.* THE UNITED STATES & THE CHEROKEE Nation.	No. 23212.	
THE EASTERN CHEROKEES *vs.* THE UNITED STATES & THE CHEROKEE Nation.	No. 23214.	

X.—General traverse, filed February 14, 1905.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every

allegation therein contained, and asks judgment that the petition be dismissed.

LOUIS A. PRADT,
Assistant Attorney-General.

86 *XI.—Argument and submission of consolidated cases Nos. 23199, 23212, and 23214.*

These consolidated cases came on to be heard upon the pleadings, orders, and proofs, and on February 14, 15, 16, 20, and 21, 1905, were argued by Messrs. Charles Nagel, Edgar Smith, and Frederic D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson, on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood, on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney-General Pradt, on behalf of the United States, and submitted.

87 XII.—*Opinion of the court, and concurring and dissenting opinions, filed March 20, 1905.*

THE CHEROKEE NATION
v.
THE UNITED STATES. } No. 23199.

THE EASTERN CHEROKEES
v.
THE UNITED STATES. } No. 23214.

THE EASTERN AND EMIGRANT CHEROKEES
v.
THE UNITED STATES. } No. 23212.

OPINION.

NOTT, Ch. J., delivered the opinion of the court:

In December, 1891, the United States and the Cherokee Nation entered into an agreement for the purchase and sale of a great tract in the Indian Territory known as the Cherokee Outlet. At the time of this negotiation the Cherokees had a grievance against the United States—a grievance which had burned in the breasts of two generations, and had never been forgiven or forgotten. That grievance was the treaty of 1835, commonly known as the treaty of New Echota—the corrupt method by which it had been procured, the ruthless means by which it had been executed, and the evasive way in which its obligations had been left unfulfilled. The history of this treaty and its consequences have been examined and set forth by this court, and need not be repeated here. (Western Cherokees v. United States, 27 C. Cls. R., 1.) It is enough to say that "the treaty of New Echota was the act and deed of neither the Eastern nor Western Cherokees," and that neither the Cherokee people nor the Cherokee government ever acknowledged it. In the words of Ross, they said in a memorial to Congress, December 15, 1837: "We

complain of sending among us a large armed force, of the attempts made to prevent the expression of opinion among us, of the arrest and imprisonment of our persons, of the expulsion of our people from their homes; for which even the document in question furnishes no ground or cause. All these, however, sink into insignificance when compared with the one overwhelming calamity, present and prospective, of having the instrument of December, 1835, enforced upon us and our people."

88 And in that remarkable petition submitted to Congress, bearing date February 22, 1838, signed by 15,665 of the Cherokee people, the whole nation reiterated, "We do solemnly and earnestly protest against that spurious instrument."

But while the Cherokee people always maintained that the treaty of New Echota was falsely executed in their name by a few unauthorized, unofficial persons, corruptly suborned by an agent of the United States, they nevertheless were compelled by the condition of affairs in the Cherokee country and by the overwhelming power of the United States to, in a measure, adopt it through the instrumentality of the Cherokee treaty of 1846 (9 Stat. L., p. 871). Of it this court has said:

"That treaty was a compact between three parties—the United States, the Eastern and the Western Cherokees. Its purpose was to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be, and to secure peace in the Cherokee country. The principle upon which it sought to accomplish this purpose was, that, on the one hand, the Western Cherokees should participate in the purchase money which had been paid for the lands east of the Mississippi, and, on the other, that they should abandon their autonomy and become subject to the government which had been established by the Eastern Cherokees.

"The reason behind the principle was that in 1835 the Western Cherokees owned the Cherokee country west, and had paid for it, and that the Eastern Cherokees acquired by the terms of the treaty of New Echota two-thirds of this without paying for it, and at the same time retained all of the purchase money which had been given for their possessions east of the Mississippi. A portion of this purchase money had been expended for the use of the Eastern Cherokees and a portion continued to be held as a trust for their benefit; the remainder had been paid to them per capita.

"If their removal had been effected on the same terms as that of the Western Cherokees, under the treaty of 1828, they would have received land in the Indian Territory in exchange for land east of the Mississippi.

"As it was, they had received both land and money; but the land was the land of the Western Cherokees. Strictly, the Government should have paid the Western Cherokees for the lands thus appropriated, and should have deducted the price from the money paid to the Eastern Cherokees. It was now sought by the treaty of 1846 to accomplish this in an indirect way; the Western Cherokees were to be admitted ab initio to a quasi partnership or joint ownership, by the terms of which they were to contribute the land in the Indian Territory and share in the proceeds of the land east of the Mississippi.

"By the terms of this arrangement the Eastern Cherokees consented to their sharing in the purchase money so far as it was still held by the United States in the form of trusts and annuities; and the United States

agreed that so far as it had been paid away to individual Indians and could not be restored they should pay it over again, and thus make good to the Western Cherokees their rightful proportion in the fund." (Western Cherokees v. United States, 27 C. Cls. R., 1, 36.)

Having thus become indirectly and unwillingly parties to the treaty of New Echota the Eastern Cherokees, nevertheless—that is to say, all of those Cherokees who were divested of their lands east of the Mississippi by the treaty of New Echota in 1835—have steadfastly and
89 persistently maintained that that treaty, harsh and inexorable as it was, has never been carried into effect according to the true import and ostensible intent of its provisions.

In 1891 the Cherokee people and the United States were confronting each other for the last time as vendors and purchasers of land. The Cherokee Outlet was then the last remnant of territory to be ceded, and in a few years the autonomic government of the nation was forcordained to cease. The Cherokee commissioners were true to their people and their fathers in demanding as a condition to the cession and as an addition to the specified consideration for the grant ($8,300,000) that all of the past treaty transactions between the United States and the Cherokee Nation should be reopened; that their demands should be reconsidered; that the moneys which might be equitably and justly due to them should be paid, and that in the final determination of these matters they should have, if they desired it, access to the judicial tribunals of the United States. These demands were acceded to by the Government of the United States, and were ratified and approved by Congress (27 Stat. L., p. 640, § 10). They found expression in the following formal agreement:

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall, at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting."

There was at the time when this agreement was *entered into no understanding* or supposition as to how the United States should render the account called for. The representatives of the United States did not themselves know. This is shown incontestably by the fact that soon afterwards the Commissioner of Indian Affairs, in response to some inquiry, reported to the Senate:

"I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation, under the treaties therein specified, and under
90 the various appropriation acts passed to carry the same into effect, this account could be prepared by this office within a reasonable time—say, about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant."

Congress adopted the latter alternative, and, by the act 3d March, 1893 (27 Stat. L., pp. 612, 643, § 10), appropriated $5,000 to enable the Commissioner "to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due," etc. Two accountants were selected by the Commissioner of Indian Affairs (Messrs. James A. Slade and Joseph T. Bender), who, after a prolonged examination, in 1894 handed in their account. It resulted in allowing three items of trifling amount, which the United States conceded, and in disallowing items which the Cherokee Nation claimed; and on the great and important subject in dispute—the treaty of New Echota—it found a balance of $1,111,284.70, and it allowed interest upon this balance from June 12, 1838. The account sets forth items and amounts and facts and reasons and conclusions, much in the form of an award; and it is not surprising that it was regarded by some persons as such and by other persons as having been intended to be such by the accountants. But the agreement did not provide that the account should be made by any specific person mutually agreed upon as umpire, or by clerks or accountants or auditors or arbitrators. All that it says is that "the United States shall, without delay, render to the Cherokee Nation a complete account." It is the United States, one of the parties, which is to do this, and not an intermediary agreeable to both parties. The United States are left free to make up the account in any manner they please; and the account, when rendered, will not be conclusive or prima facie for or against the Cherokee Nation. The one thing that is certainly assured to the nation, and the only thing, is that the account will be the portal through which the Cherokee Nation can carry the rights and the wrongs of its people into a judicial forum.

At this point the uncertainties and the controversies of the case begin. When the account came in (April 28, 1894) the Secretary of the Interior

(who occupies the same position with regard to Indian nations and tribes that the Secretary of State does with regard to foreign nations) transmitted it (May 21, 1894) to the Cherokee Nation. The nation accepted it (December 1, 1894) and signified their acceptance, thereby waiving the items which the accountants had disallowed and its right to carry those rejected items into the courts of the United States. On January 7, 1895, the Secretary of the Interior transmitted the account, together with the acceptance of the Cherokee Nation, to the House of Representatives.

Congress did not make the appropriation in the manner prescribed in the agreement—"Such appropriation to be made by Congress if then in session, and if not, then at the session immediately following
91 such accounting"—but, on the contrary, did nothing. At the end of the session the House of Representatives, on the 2d of March, 1895, called on the Attorney-General for an opinion concerning the conclusions reached by the accountants. The Attorney-General made his reply at the beginning of the next session, in December following. The second session, "the session immediately following such accounting," passed without Congressional action of any kind. On the 20th of February, 1901, the Senate transmitted to the Court of Claims a bill calling for a report of the facts. On April 28, 1902, the court transmitted to the Senate its findings of fact under such reference, but expressed no opinion upon any question of law. Not until the 1st of July, 1902, did Congress act, and their action was merely passing the jurisdictional statute under which the court is now acting. (32 Stat. L., p. 716.)

On the trial of this case the arguments extended over a very wide range of fact and law, going back to the treaty of New Echota and coming down to the questions whether the account of Messrs. Slade and Bender could be considered as an award or as an account stated.

In the opinion of the court the account can not be regarded as an award; in the opinion of the court it does not have one element of an award. An award is the result of an examination in some form or other by a person mutually agreed upon. In building contracts courts have constantly before them stipulations that certain things shall be decided by the architect, or by the engineer in charge, whose decision shall be final. Such awards, within proper limitations, are to be upheld. But in the agreement now before us there is not so much as the suggestion of a person who shall act as umpire or of a matter to be submitted to him. All that the agreement requires, as before has been said, is that one of the parties, the United States, shall render to the other their account. How they shall render it, in what form they shall render it, to what extent they shall render it, is left entirely to themselves. It is to be the account of the United States, and not the account of some person acting for both parties. Before there can be an award, having the element of finality, there must be something mutually submitted to somebody. Such was not the case here.

Neither can the court regard it as an account stated. An account stated is something arising in the ordinary course of business between men having continuous business transactions. When one of them, the creditor, makes out an account and the other, the debtor, accepts it, an action will lie upon it. The acceptance may be express or implied. If

the one sends it and the other raises no objection to it within a reasonable time, the law merchant holds that he assents to it; and then, if he did not object when he should have objected, that he will be estopped from objecting. The account rendered then becomes an account stated, from which the law will imply a promise to pay the balance appearing to be due, and upon which an action may be brought. The Slade and Bender account does not contain these elements. It is the creditor and not the debtor who furnishes an account stated; it is the debtor and not the creditor who must assent to it. This account was merely "rendered" and by the debtor, and under a specific agreement which provides what shall be done with it. The question is not whether it was or was not an account stated, but what may be the liabilities of the parties under the specific agreement.

92 But while the account was neither an award nor an account stated, it must be conceded that the scope of the accounting was intended to be as broad as the causes of action secured by the agreement to the Cherokee Nation—"the right within twelve months to enter suit against the United States in the Court of Claims for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting." That is to say, the court, or the accountants, were to go behind statutory and treaty bars and receipts in full and were to consider "any alleged or declared amount of money promised but withheld" "under any of said treaties or laws." This meant that there were to be no technical defenses set up, no pleas of res judicata, no releases or relinquishments, compromises or settlements, or it meant nothing. For if the proposed suit of the Cherokees was to be decided strictissimi juris, i. e., upon technical defenses, it had already been decided against them.

That decision was not against the Cherokee Nation, but it was against Cherokee citizens. The Cherokees have maintained from the first and always that to make them pay for their removal from homes which they did not wish to leave to a country to which they did not wish to go was a monstrous abuse of the obscure provisions of a treaty which they had not read, which they had not signed, and to which they had not in fact been parties. "Immediately before, and up to the time of the eviction of the Cherokees, the Government had been carrying on a negotiation with their delegates who had submitted certain propositions looking toward a new treaty. On the 18th of May, 1838, Mr. Poinsett, Secretary of War, communicated his objections of them to the delegates, but at the same time made to them an offer, the substance of which was that if the Cherokees would 'remove peaceably and contentedly to their new homes in the West' the United States would defray the expenses of their removal and subsistence. This offer bears date only five days before the eviction began. It was not accepted by the Cherokees, but seems to have been tacitly acquiesced in, they removing peaceably if not contentedly, and subsequently claiming that the cost of removal and subsistence should not be borne by themselves." (Western Cherokees v. United States, 27 C. Cls. R., 1, 44.) Yet the court was obliged in that case to hold, according to the letter of the law (the treaties, the statutes, the acquit-

'ances), that the cost of removal was to be a charge upon the $5,000,000 treaty fund and to be borne by the Cherokees. It is manifest that the agreement, here, intended something more than that the Cherokees might come into court to be immediately turned out under previous decisions. Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them so to believe) that all of their claims and rights and equities were to be reopened and reexamined de novo; and that upon the faith of that belief they made a cession of the Outlet.

In the opinion of the court this case is simply one to recover purchase money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be delivered until the purchase money is paid or secured or, at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase money should be paid soon. But, nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a case of sale and delivery and nonpayment of the purchase money for the thing sold and delivered. The United States were willing to pay; the Cherokee Nation wanted the payment made at the earliest possible day; both parties agreed upon a method by which it should be paid as nearly immediately as was possible. The United States were to render their account "without delay;" if the Cherokee Nation accepted it the amount was to be appropriated by Congress; such "appropriation was to be made by Congress, if then in session, and if not, then at the session immediately following such accounting." If the Cherokee Nation did not accept the accounting, or regarded it as incorrect or unjust, and carried it into the courts and recovered a judgment, Congress was to appropriate "at its next session after such case shall be finally decided." Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have made the obligation to pay promptly more unequivocal and specific. Time was of the essence of the contract, so far as the words of the parties could make it.

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The court does not intend to imply that when the account of Slade and Bender came into the hands of the Secretary of the Interior he was bound to transmit it to the Cherokee Nation. On the contrary, the Cherokee Nation had not agreed to be bound by the report of the accountants and could not claim that the United States should be. The accountants were but the instrumentality of the United States in making out an account. When it was placed in the Interior Department it was as much within the discretion of the Secretary to accept and adopt it or

to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out; and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. When the account was thus received by the Cherokee Nation (May 21, 1894) the "twelve months" of the agreement, within which the nation must consider it and enter suit against the other party in the Court of Claims began to run; and with the nation's acceptance of the account (December 1, 1894), the session of Congress at which an appropriation should be made became fixed and certain. The Secretary did not recall the account; the United States never rendered another; and the utmost authority which Congress could have have exercised, if any, was at the same session, or certainly within the prescribed "twelve months," to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within
94 which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament; and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement.

When the agreement is analyzed it seems plain that if the court were to uphold the course which the United States have pursued it would have to adopt one of two alternatives: Either it would have to read into the agreement provisions which are not there and which are the converse of those which are there (that it was the Cherokee Nation, and not the United States, which was to render the account; that it was the United States, and not the Cherokee Nation, which might object to the account; that it was the United States, and not the Cherokee Nation, to whom judicial redress was given), or it would have to hold that the agreement promised nothing, assured nothing, gave no judicial means of redress, and left the Cherokee Nation in precisely the same plight that it would have been in if no agreement had been made, to wit, with a controversy of nearly seventy years still unsettled.

The question which next arises relates to the contending parties before the court—the Cherokee Nation being the Cherokee government, the Eastern Cherokees being the communal owners.

The contracting party here, being also the party who made the conveyance of the Cherokee Outlet, was the Cherokee Nation; and if the lands of the Cherokees were, like the lands of the United States, Government lands, or public lands in which the Government has the sole proprietary interest and in which no individual has any personal interest whatever, there could not be a doubt of the exclusive right of the Cherokee Nation to have a judgment awarded in its name. But in 1835 the lands of the Cherokees east of the Mississippi, and in 1846 the lands of the Cherokees in the Indian Territory, were neither public nor private lands in the ordinary sense of those terms. The term "communal," it is believed, is not to be found in treaties or statutes or public documents

relating to the Indians prior to the date of the case of the Western Cherokees (27 C. Cls. R., 1). But the officers of the Government, under stress of circumstances—that is to say, the expectations of the Indians—have always treated Indian lands as communal, though they did not use the term and had very dim perceptions as to the nature of the estate. Whenever the Government has paid for a cession of Indian land per capita to every member of an Indian community, share and share alike, it was because the Indians knew that their lands were communal property and that they, as communal owners, were entitled to the purchase money. The case of the Western Cherokees (supra) is so nearly identical to the present one as regards the parties claimant that the opinion in that case correctly sets forth the facts and the law of the present one:

"The lands east of the Mississippi were not vested in the Cherokee government as distinguished from the Cherokee people. Their chiefs in council, as representative of the body politic, might, perhaps, have sold or disposed of them, but under their constitution and laws could not have brought an action of trespass or ejectment against one of their own citizens for dwelling upon or hunting over the lands. The title was not vested in the Cherokees as individuals. They were neither tenants in common nor joint tenants. The individual Cherokee had no vested right which he could convey or devise or make the subject of a suit in partition. It he withdrew from the community
95 he left all rights behind him, and if a stranger was admitted he acquired a right by virtue of his admission alone. The property was communal—a property wherein every person, not as an individual, but as a member of the community, held an equal, indistinguishable, indivisable right of user, and nothing more." (Western Cherokees v. United States, 27 C. Cls. R., 1, 53.)

The present case is also complicated by the fact that a considerable portion of these communal owners are neither citizens of the Cherokee Nation nor subject to its jurisdiction nor dwellers within its territory, but are and always have been residents of territory east of the Mississippi, owing allegiance now exclusively to the United States. It is also complicated by the fact that the account rendered by the United States to the Cherokee Nation is made up of four distinct and essentially different items: One, the chief one, is for money erroneously charged to the Cherokees instead of being divided per capita among them; another is for money which should have been added to the principal of the school fund, a fund which is held by the United States in trust; a third is for money improperly charged to the Cherokee national fund, likewise held in trust by the United States. Only one appears to be money properly due to the Cherokee Nation as a government, and that for the inconsiderable amount of $432.28. The case is further complicated by the fact that the government of the Cherokee Nation is passing away; that it has already ceased to possess a judiciary, and that on the 4th of March, 1906, it will, to all intents and purposes, expire.

The action instituted in this court by the Cherokee Nation was properly an action at law to recover a liquidated amount of money upon an express contract. But the act 1st July, 1902 (32 Stat. L., p. 716, §68), under which it was instituted, authorized the court to adjudicate any claim which the Cherokee Nation "or any band thereof" might have

against the United States, with "full authority by proper orders and process to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy." The supplemental act 3d March, 1903 (32 Stat. L., p. 996), expressly authorized "the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River," to come in and prosecute their claims, with power to the court "also to determine as between the different claimants, to whom the judgment so rendered equitably belongs." The case, then, being that of many persons severally interested in a common fund, is one of which equity takes jurisdiction; and the several suits merged by interpleader into one have become a suit in equity.

While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case the negotiations have been with representatives of the owners. The chiefs and headmen have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate; and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf but allowing them to receive the consideration per capita. In the present case the
96 Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and headmen of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their Government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the west, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed per capita. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund; but their rights were inextricably woven with the rights and equities of the Cherokees, who were citizens of the nation; and the nation properly made no distinction when parting with the Outlet, but demanded justice, from the Cherokee point of view, for all Cherokees who had been wronged by the nonfulfillment of the treaty of New Echota. As to these Eastern nonresident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.

After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners. A great change has come within a few years both as to the powers and the responsibilities of the Cherokee

Nation. Its statute went to the full extent of the civil law in making the Government liable to all persons being citizens of the nation: "The Cherokee Nation shall be liable to all persons whatever, citizens of the nation, having claims at law or equity against her, to the same extent as individual persons are liable to each other, and may be sued by any citizen having a cause of action." (Code 1874, p. 240, § 130.)

But its judiciary has ceased to exist, and, as has before been said, the nation itself as a government will cease to exist. "The constitution of the Cherokees was a wonderful adaptation to the circumstances and conditions of the time, and to a civilization that was yet to come. It was framed and adopted by a people, some of whom were still in the savage state and the better portion of whom had just entered upon that stage of civilization which is characterized by industrial pursuits, and it was framed during a period of extraordinary turmoil and civil discord, when the greater part of the Cherokee people had just been driven by military force from their mountains and valleys in Georgia, and been brought by enforced immigration into the country of the Western Cherokees; when a condition of anarchy and civil war reigned in the Territory—a condition which was to continue until the two branches of the nation should be united under the treaty of 1846 (27 C. Cls. R., 1); yet for more than half a century it has met the requirements of a race steadily advancing in prosperity and education and enlightenment so well that it has needed, so far as they are concerned, no material alteration or amendment, and deserves to be classed among
97 the few great works of intelligent statesmanship which outlive their own time and continue through succeeding generations to assure the rights and guide the destinies of men. And it is not the least of the successes of the constitution of the Cherokees that the judiciary of another nation are able, with entire confidence in the clearness and wisdom of its provisions, to administer it for the protection of Cherokee citizens and the maintenance of their personal and political rights." (Journeycake v. Cherokee Nation, 28 C. Cls. R., 281, 317.)

Since those words were written a hopeless development has taken place in the affairs of this people. It has been with them as it has been with other nations—as it has been with families and individuals—to rise in the times of their tribulation, but to sink under the enervating blessings of prosperity.

"On the 1st August, 1838, while the dispirited throng of Cherokee exiles paused in their march at a temporary halting place, the name of which does not appear on the map nor in the list of post-offices, and which is known only from what transpired there as 'Aquohee camp,' they were able to declare through the hand of their great statesman and leader, Ross, that—

"Whereas the Cherokee people have existed as a distinct national community in the possession and exercise of the appropriate and essential attributes of sovereignty for a period extending into antiquity beyond the dates and record and memory of man;

"And whereas these attributes, with the rights and franchises which they involve, have never been relinquished by the Cherokee people, but are now in full force and virtue;

"And whereas the natural, political, and moral relations subsisting

among the citizens of the Cherokee Nation toward each other and toward the body politic can not, in reason and justice, be dissolved by the expulsion of the nation from its own territory by the power of the United States Government:

"Resolved, therefore, by the national committee and council and people of the Cherokee Nation in general council assembled, That the inherent sovereignty of the Cherokee Nation, together with the constitution, laws, and usages of the same, are, and by the authority aforesaid are hereby declared to be in full force and virtue, and shall continue so to be in perpetuity, subject to such modifications as the general welfare may render expedient." (Western Cherokees v. United States, 27 C. Cls. R., 1, 29.)

This declaration was an heroic resolve amid the most adverse circumstances to preserve forever the autonomy of the Cherokee people. It was not made in vain for the generation which so resolved. But the case of affluence and the inevitable demoralization of wealth have accomplished where the military power of the United States and the corrupt methods of their agents failed, and within the passing of less than three generations the perpetuity of the constitution and laws and usages of the Cherokee people will have come to an end.

In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person which should not be intrusted with the receipt and distribution of the moneys belonging to other persons.

98 The persons to whom distribution of this fund of $1,111,284.70 with accrued interest would be made if they were now living would be the communal owners of the Cherokee lands east of the Mississippi. By the tripartite treaty of 1846 the Western and the Eastern Cherokees were placed on the same footing with regard to all lands east of the Mississippi and with regard to the funds derived from them. It follows, necessarily, that each and all of the present communal owners, whether on the east or the west of the Mississippi, and whether the descendents of Eastern or Western Cherokees, have the same individual interest in the fund and will be entitled to like amount per capita.

A decree will be entered in this case following the form of that which was entered in the case of Whitmire, trustee, v. Cherokee Nation (30 C. Cls. R., 180). It will provide:

That the Cherokee Nation recover upon the agreement with the United States concluded on the 19th December, 1891, and ratified by the United States 3d March, 1893 (27 Stat. L., p. 640, §10), the amounts found due in the account rendered thereunder by the United States, to wit:

The value of three tracts of land containing 1,700 acres, at $1.25 per acre	$2,125.00
Amount paid for removal of Eastern Cherokees to the Indian Territory	1,111,284.70
Amount received by receiver of public moneys at Independence, Kans.	432.28
Interest on $15,000 of Choctaw funds, applied in 1863 to relief of indigent Cherokees	20,406.25

That the amount of $2,125, with interest thereon from February 27, 1819, to date of payment, nevertheless be retained by the Secretary of

the Interior and credited by the United States to the principal of the Cherokee school fund in their possession and of which they are trustees;

That the amount of 20,406.25, together with interest thereon from July 1, 1893, to date of the restoration of the fund, be likewise retained by the Secretary of the Interior and credited to the Cherokee national fund in the possession of the United States and of which they are trustees;

That the amount of $1,111,284.70, together with interest thereon from June 12, 1838, to a day when the Secretary of the Interior shall be ready to make payments, as hereinafter provided, nevertheless be paid directly to communal owners being Cherokees by blood, whether on the eastern or western side of the Mississippi River. And to that end the Secretary of the Interior is authorized to appoint one or more commissioners to proceed to the Cherokee country and to the country of the Cherokees residing east of the Mississippi to ascertain and report to the Secretary the facts necessary for the formation of rolls of all Cherokees by blood, the expenses of making out and preparing such rolls to be a charge upon and paid out of the fund awarded by the decree.

The decree will also provide for the payment of the fund to the parties per capita, the charge of distribution likewise to be a charge upon the fund.

The decree will also provide for the payment to the treasurer of the Cherokee Nation $432.28, together with interest thereon from January 1, 1874, to date of payment, as likewise set forth in said account.

The decree will also provide for the compensation of counsel and expenses and disbursements incident to the litigation.

99 WELDON, J., concurring:

Without going into the merits of this controversy on the different treaties made between the parties to this proceeding, and the laws of the United States enacted from time to time affecting the liability and relation of the parties, I come to consider the legal effect of the finding made by the agents and officers of the United States under the agreement of December 19, 1891, described in the act of March 3 (27 Stat. L., p. 640, sec. 10).

Commencing with the year 1835, in which year the treaty of New Echota was made with the Eastern Band of Cherokee Indians, disputes and differences existed between the United States and the Indians which culminated in the year 1891, when a treaty was made involving the sale and purchase of a district of country amounting in the aggregate to over 8,000,000 acres of land, known as the Cherokee Outlet. Aside from the intrinsic value of the lands there was a most material consideration moving to the United States in the necessity of having that tract of land; and, to the end that the United States might be the owner of that splendid domain of territory, they agreed to pay the Indians the sum of $8,300,000; and, as a further consideration and inducement to the Indians to enter into such an agreement, it was stipulated on the part of the United States as follows, to wit:

"The United States shall, without delay, render to the Cherokee Nation, through an agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the

the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835–36, 1846, 1866, and 1868 and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such an accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right to appeal to the Supreme Court of the United States, by either party, for any declared or alleged amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting. And the Congress of the United States shall at its next session after such case shall be finally decided and certified to Congress, according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of the national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting."

The subject-matter of the consideration upon the part of the Indians was composed of two elements; in the first they were to receive the sum of $8,300,000, a part of the consideration of the conveyance, and as the second element of consideration they were to receive "a complete account of the moneys due the Cherokee Nation" under all the treaties and laws which from 1817 to 1868 had been made or enacted affecting the pecuniary relations of the parties. The account was to be accepted or
100 rejected by the Indians as they might determine. It was known to them that an alleged settlement had been made in the year 1852, the legal effect of which had always been disputed by the Indians; and the agreement to render an account "of moneys due" "to an unlettered party" at least would be accepted as an opportunity to be relieved from the legal effect and binding force of the alleged settlement, by and through which they had been held at arm's length through more than a generation of their people.

Then follows another provision well calculated to operate on the minds of the Cherokee Nation as a special and material inducement to the making of the treaty or agreement of 1891. "And upon such accounting should the Cherokee Nation by its national council conclude and determine that such an accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims," with the right of appeal to the Supreme Court of the United States by either party for any declared or alleged amount of moneys.

The consideration therefore consists of different elements of inducements, and in law those elements constitute and form the basis upon which the agreement rests, and none can be eliminated without the destruction of the entire force of the agreement.

The consideration though in parts and sections is a unit, and to disturb or eliminate one element is to destroy the whole. The considera-

tion is the basis of the contract, and without its preservation as a whole the contract falls.

The court must therefore assume that without all of the considerations the Cherokee Nation would not have released to the United States a district of country large enough and rich enough to be one of the States of the Union.

Much discussion has been indulged in upon the question as to whether the finding which was submitted to the Cherokee Nation is an award, and if not an award, an account stated. It is not necessary to indulge in black letter learning upon the legal effect or character of the "account of moneys due the Cherokee Nation." It was a statement of the account founded upon the legal theory of the Cherokee Nation, and for which the Indians had struggled through the years from 1835 to 1891. It to them was a slow and tardy relief from the alleged iniquities and frauds of 1835, which, as they always thought, was the inception of their woes.

Upon the question as to whether the account rendered is in law an award or account stated, or whether it is either, is wholly immaterial to the proper settlement of the issue of this proceeding, and it is profitless to sagely balance the common-law question as to what constitutes either. It is sufficient for the purpose of this litigation to say that it is a material and lawful part of the consideration of a contract made by and between competent parties upon the subject-matter of which they had plenary jurisdiction.

In this connection it is apt to quote what the Supreme Court has said in the case of Worcester v. State of Georgia (6 Peters, 552):

"The language used in treaties should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than the plain import as connected with the tenor of the treaty, they should be construed as used in the latter sense.

* * * * * * *

"How the words of the treaty were understood by this unlettered people rather than in their critical meaning should form the rule of
101 construction. The question may be asked, Is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe with whom we have made treaties?

"The inquiry is not what station shall be given to the Indian tribes in this country, but what relation have they sustained to us since the commencement of our Government? We have made treaties with them, and are those treaties to be disregarded on our part because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them have we not admitted the power of this people to bind themselves and impose obligations on us?"

So, in 5 Wallace, 737:

"Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence a provision in an Indian treaty which exempts their lands from 'levy, sale, and forfeiture' is not, in the absence of an expression so to limit it, to be confined to a levy and sale under ordinary judicial proceedings only, but it is to be extended to levy and sale by county officers for nonpayment of taxes."

Congress having failed to pay the amount found due under the treaty of 1891 by the report of Messrs. Slade and Bender, passed an act of 1902, by virtue of which this court has jurisdiction.

The matter of complying with the treaty of 1891 was left by the appropriation act (to defray the expense of furnishing a statement to the Indians) to the Commissioner of Indian Affairs under the direction of the Secretary of the Interior as shown by the communication.

The Secretary in his communication to the Speaker of the House also transmits "a certified copy of the Cherokee national council accepting such accounting."

Up to that point the executive officers of the Government were proceeding step by step in the fulfillment of the promise made in the treaty of 1891, upon the faith of which the United States had acquired and were then in the enjoyment of the "Outlet."

The United States had bought the land of the Indians not for the sum of $8,300,000, but for that sum and other undertakings vital as an inducement to the Indians in making the agreement of 1891.

Courts can not apportion the consideration of a contract and say this is material and that is immaterial; parties have the right to measure the value of what they contract for, and are entitled to have that recognized by the courts.

The Congress in ratification of the plan of settlement, as provided in the treaty of 1891, passed an act appropriating the sum of $5,000 for the purpose of ascertaining the amount due the Cherokee Nation, and in pursuance of that act the Secretary of the Interior appointed James A. Slade and Joseph T. Bender to state the account then existing between the United States on one hand and the Cherokee Nation on the other, and in pursuance of such appointment and upon the fundamental authority of the agreement with the Indians made an examination and upon the result of that examination made a report of the indebtedness of the United States founded upon the theory that the removal of the Indians under the various treaties was to be at the cost of the United States.

102 It is not pretended that any mistake was made by the accountants upon the legal theory which they adopted as the basis of the liability of the defendants.

Upon the receipt of that report the Secretary of the Interior transmitted to Congress, through the Speaker of the House, the report of the expert accountants in the following communication:

"DEPARTMENT OF THE INTERIOR,
"*Washington, January 7th, 1895.*

"SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article two of the agreement made December 19th, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3rd, 1893 (27 Stats., 643), a certified copy of a complete account of money due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1828, 1835–6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them into effect, prepared in accordance with the provisions of said act of March 3rd, 1893, together

with a certified copy of the Cherokee national council accepting such accounting.

"Very respectfully,

"HOKE SMITH, *Secretary.*

"The SPEAKER OF THE HOUSE OF REPRESENTATIVES."

The account when rendered to the Cherokee Nation proved acceptable to it and upon the faith of its acquiescence in the report, as shown by the letter of the Secretary of the Interior, the council of the nation passed a formal acceptance of it.

If the United States were dissatisfied with the report of Slade and Bender, the dissatisfaction should have been manifested as soon as it was known to the authorities of the United States who had in charge the matter and not after the Cherokee council had formally accepted the report as a correct statement of the account between the parties, and a formal delivery to the Cherokee Nation of a part of the consideration on which the bargain and sale of the land were made.

The appointment of the expert accountants, the acceptance from them of the result of the examination, and the transmittal of the report to the Cherokee Nation was the official act of the Secretary of the Interior, the officer who above all others has jurisdiction of the Indians of the United States. It is that Department of the Government which deals with the finances and all other interests belonging to the Indians of the United States. The Secretary of the Interior and the instrumentality of his Department is the medium through which the United States deals with "the wards of the nation."

The report which was to be furnished to the Indians for their acceptance or rejection has incident to it another important qualification; and that is if the Indians were dissatisfied with the statement of moneys due then they had the right to bring a suit against the United States within twelve months to settle by judicial determination the respective right of the parties. Relying on the good faith of the Government, the council of the Cherokee Indians accepted the statement of Slade and Bender and thereby waived the right to bring a suit against the United States; and, that right being waived, founded on the action of the United States, are
they not now estopped from denying the legal effect of their own
103 act? The Indians were misled by the act of the United States when they assumed that the account after acceptance would be dealt with in pursuance of the other requirements of the treaty. Consider the rights of the litigants in the light of the law which has been announced for nearly a century by the Supreme Court of the United States, the fundamental theory of which is that language must never be construed to their prejudice. (Worcester v. State of Georgia, supra.)

The position of the defendants in refusing to abide by the result of the treaty of 1893, consummated as it was by the act of the Cherokee council, the executive officers, and the lawfully authorized agents of the United States, is not keeping faith with the wards of the nation in the spirit of that "justice and reason" recognized by the courts when dealing with the obligation of the United States as the guardian of the Indian.

In the case of the Choctaw v. The United States (119 U. S. R., p. 1) it is said in the syllabi:

"The relation between the United States and the Indian tribes, being those of a superior toward an inferior who is under its care and control, its acts touching them and its promises to them, in the execution of its own policy and in the furtherance of its own interests, are to be interpreted as justice and reason demand in cases where power is exerted by the strong over those to whom they owe care and protection. (United States v. Kagama, 118 U. S., 375, cited and applied.)"

I concur in the result reached by the court as exemplified in the opinion of the Chief Justice.

PEELLE, J., concurring.

I concur in the conclusion of the court that there should be a recovery against the United States for the several amounts found due by the experts, Slade and Bender, but in my view of the case that conclusion should be sustained upon the theory, or assumption, as the experts say, "that the United States was to pay the expense of removal" of the Eastern Cherokees from their eastern home to the Indian Territory.

If the United States are so liable, then the defendants concede that the account as stated by Slade and Bender is correct.

The first and main question to be determined, therefore, is as to the liability of the United States, and it is conceded that if such liability exists it arose under the treaties of 1835–36 and 1846 (7 Stats. L., 478, and 9 Stats. L., 871).

To interpret correctly the treaty of 1835–36 within the spirit of the decisions of the Supreme Court, it is essential to know how the Cherokee people understood the terms of the treaty and whether they had probable grounds for such understanding.

Practically from the beginning of the Government—to make room for white settlers—it was the policy of the United States to encourage the removal of the Indians domiciled in the Eastern States to the territory west of the Mississippi River. This policy is now manifest from the various treaties entered into by the United States with the several tribes—now a part of the history of the country—by which the Indians ceded their lands situate in the Eastern States to the Government and migrated to territory provided for them west of the Mississippi River.

104 By the treaty of 1817 with the Cherokee Indians (7 Stat. L., 156), in furtherance of promises previously made by the President that those Indians who desired to continue the life of hunting instead of settling down to agriculture and civilized life, should have homes in the West on the waters of the Arkansas and White rivers (to which some of the Indians had migrated), it was provided in article 6, in addition to the compensation therein provided for the improvements left by them, that to aid in their removal the United States agreed "to furnish flat-bottomed boats and provisions sufficient for that purpose. * * * The boats and provisions promised to the emigrants are to be furnished by the agent on the Tennessee River, at such time and place as the emigrants may notify him of; and it shall be his duty to furnish the same."

By the treaty of 1828 with the Western Cherokees (7 Stats. L., 311) who had migrated to Arkansas Territory under the promise of the President and the treaties of 1817 and 1819, whereby the lands of the Western

Cherokees in that Territory were exchanged for lands in the Indian Territory, the United States by article 8, to encourage the Cherokees residing East to join their brothers in the West, agreed in addition to giving them certain specified articles, to pay the cost of their emigration and to furnish them with provisions for their support on the way and provisions for twelve months after their arrival at the agency, and in addition thereto to give each person who took along with him four persons as emigrants and permanent settlers the sum of $150.

Thus, in addition to paying the expenses of removal and subsistence as there stated, the United States agreed, by way of encouraging them to induce others to migrate, to pay a bonus to each individual taking four such persons with him.

The treaty of 1833 (7 Stats. L., 414), as provided by article 5 thereof, was supplementary to the treaty of 1828 and was "not to vary the rights of the parties to said treaty any further than said treaty is inconsistent with the provisions of this treaty, now concluded, or these articles of convention and agreement."

It was not only the policy of the United States, as before stated, to encourage the removal of the Indians westward, but it was their policy to pay the expenses of their removal and their subsistence, as shown by the treaties with the Choctaws in 1820 (7 Stats. L., 210); with the Creeks in 1826 (7 Stats. L., 286); with the Chickasaws in 1832 (7 Stats. L., 381); with the Seminole in 1832 (7 Stats. L., 368), and with the Delawares and the Delawares and Shawnees in 1829 and 1832 (7 Stats. L., 327 and 397). Can it be doubted that what was thus done was well known to the Cherokee Indians at the time of the treaty of 1835? Indeed, when a draft of the latter treaty was first submitted to them in general council at Red Clay, October 23, 1835, there was read and interpreted to them a letter from President Jackson in which, among other things, he said "for the removal, at the expense for the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of $150 to each person." (H. R. Docs., vol. 7, No. 286, p. 41, 24th Cong., 1st sess.)

And so the eighth article of the treaty of 1835 provided:

"The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage
105 wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

"Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided."

Up to this point, therefore, I take it there can be no well-grounded

controversy either as to what the Government had done respecting the cost of removal and subsistence of the various tribes of Indians theretofore removed to the Indian Territory, or as to what the purpose of the Government was by article 8 of the treaty of 1835 respecting the like expense of removing the Cherokees to the same Territory.

The language of the article will not bear the construction that the Government was advancing money to defray such expense or that the allowances therein provided to those capable of removing themselves was intended as a charge against the treaty fund.

But for article 15 of the treaty it must be conceded that the Government had obligated itself to defray the cost of removal and subsistence, and this was not only in conformity with what the Government had theretofore done respecting the removal of other Indian tribes, but was in conformity with the promise of the President made to the Indians in general council when a draft of the treaty was first submitted to them at Red Clay some two months before, in substantially the same form in which it was finally signed at New Echota, in the State of Georgia.

Now, keeping in mind what has been said respecting the understanding of the Cherokee people as to who was to pay the cost of their removal and subsistence, turn to article 15, which provides:

"ARTICLE 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts, and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national funds provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east, they shall also be paid for their improvements, according to their approved value, before their removal, where fraud has not already been shown in their valuation."

Between the provisions of that article and those of article 8, respecting the cost of removal, there is a conflict, and if the ordinary rules of construction applicable to contracts between individuals are enforced,
then it must be conceded that the cost of removal was properly
106 charged to the treaty fund. However, after this treaty had been
signed, but before its ratification, a controversy arose as to whether the provisions of the treaty obligated the United States to pay the cost of removal, the Cherokee people insisting that the United States were so bound; and hence supplementary articles were entered into, which, so far as material to this case, are as follows:

"ARTICLE 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars, fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River, was not intended to include the amount which may be required to remove them, nor the value of certain

claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question, and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above-mentioned sum of five millions of dollars should include the objects herein specified, that in that case such further provision should be made therefor as might appear to the Senate to be just.

"ARTICLE 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people, to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions and of the sum of three hundred thousand dollars for spoliations described in the first article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

"But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate, and if they shall approve the same then this supplement shall remain part of the treaty."

The Senate agreed to the supplementary articles, and the treaty as thus supplemented was ratified and subsequently promulgated. Thus the supposition of the Cherokee people that the United States were to bear the cost of removal was conceded by the Senate (which had fixed the value of their lands and possessions at $5,000,000) to be well founded, for upon the basis of the cost of removal, as stated in article 8, the sum agreed upon was thought to be sufficient, and if it had been, the controversy in that regard would have ended there. The allowance of $600,000 was not in the nature of a gratuity, but was in furtherance of a right which the Senate conceded.

The grounds for allowing the sum of $600,000, as recited in the second supplementary article, were that the Cherokee people supposed that the sum of $5,000,000 so fixed by the Senate as the value of their lands and possessions "was not intended to include the amount which may be required to remove them," and in the third supplementary article it was "therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal" and certain other claims there stated.
107 And it was therein expressly understood that if said article should be approved by the Senate, "then this supplement shall remain part of the treaty."

Inasmuch, therefore, as the basis of that allowance was the belief of the Cherokee people that the $5,000,000 fixed by the Senate as the value of their lands and possessions "was not intended to include the amount which may be required to remove them, etc.," I am of the opinion that the supplementary articles necessarily operated to modify article 15 by eliminating therefrom the word "removal," thereby harmonizing that article with article 8. Certain it is that when the Senate ratified the

supplementary articles allowing the sum of $600,000, which had been estimated as the amount necessary for the purpose stated, the practical effect was to eliminate from article 15 the word "removal," and such, I believe, was the intention of the parties from the language which they employed.

In the case of Cherokee Nation v. Georgia (5 Pet., 1, 15) the court, by Chief Justice Marshall, some four years before the treaty of 1835, in speaking of the controversy between the Cherokee Nation and the State of Georgia, said:

"If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant the present application is made."

And further along in the same opinion, in referring to the tribes which reside within the acknowledged boundaries of the United States, it is said:

"They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

"They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their great father."

In the later case of Worcester v. Georgia (6 Pet., 515, 582) Mr. Justice Washington, in a concurring opinion, said:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."

And such has been the holding of our courts in dealing with the Indian tribes ever since. And especially should this rule prevail where
108 the Indians sign a treaty by mark, as they did the treaty of 1835, and when the terms of the treaty were made known to them only by the oral translation of an interpreter.

Notwithstanding the Indians were required by the provisions of article 16 of that treaty to remove within two years, only a small minority migrated prior to 1837–38. But the expense of the removal and subsistence of that minority, together with the other expenditures chargeable thereto, nearly exhausted the $600,000 allowed by the third supplementary article, so that it became necessary to make a further appropriation to defray the expenses of removal and subsistence of those thereafter migrating. The expense of such removal and subsistence was estimated by the Secretary of War, and thereafter the Congress, by the act of June

12, 1838, appropriated the sum so estimated as "in full of all objects in third article of supplementary articles of treaty of 1835 with the Cherokees;" and in the same paragraph it was recited that "No part of said money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty." If not to be so deducted, then it certainly follows that the United States were to pay the cost of such removal and subsistence; not a part of it, but the whole of it.

Notwithstanding the provision thus made, the Indians were still opposed to removal, but when confronted with the military forces under General Scott they finally yielded, and an arrangement was entered into whereby they were nearly all removed to the Indian Territory by the fall of 1838. The cost of this removal and subsistence largely exceeded $1,000,000, and of the sum paid by the United States $1,111,284.70 was charged to the treaty fund; hence the cause of complaint.

Soon after their removal trouble arose between them and the Western Cherokees, as well as those Cherokees who had been signatory parties to the treaty of 1835 and had migrated thither prior to 1838. The Eastern Cherokees were by far the most numerous, and though they repudiated the treaty of 1835 and charged that those who had entered into it had done so through corrupt motives, still they sought governmental control of the nation, which was resisted by the Western Cherokees, claiming that as the Eastern Cherokees had come into their territory without their consent and without payment for any portion of the lands they should be subject to the rule of the Western Cherokees. But the Eastern Cherokees refused to be controlled by the minority. The result was that trouble arose, and serious consequences were anticipated if something was not speedily done to allay the ill feeling.

In 1838, in national convention assembled, the people comprising the eastern and western Cherokee nations were, by mutual agreement, united into one body politic under the style and title of the Cherokee Nation, and in that name it was agreed that all rights and titles to Cherokee public lands east or west of the Mississippi River, together with all of their interests which may have vested in either branch of the Cherokee family, whether inherited or derived from any other source, should vest unimpaired in the Cherokee Nation.

Soon thereafter the reunited Cherokees adopted a constitution, declaring that the two branches had become reunited and that "the lands of the Cherokee Nation should remain common property."

Such declared union, however, did not have the effect of allaying the difficulties between the two factions. Extreme measures were
109 being resorted to by both factions to accomplish their ill-conceived purposes, and at the same time the Eastern Cherokees were claiming that the expense of their removal and subsistence should be borne by the United States.

These differences, bordering on bloodshed as between the two factions, and the increasing hostility of the Eastern Cherokees toward the United States for charging them with the cost of removal and subsistence, led to the treaty of 1846 (9 Stats. L., 871). The preamble to that treaty recites that the purpose of the treaty was to effect a final and amicable settlement of the claims in controversy between themselves and between them and the United States; and to that end it was in substance

agreed that the lands occupied by the Cherokee Nation should be secured to the whole people and that the United States should issue to them a patent for said lands; a general amnesty was declared in respect to all difficulties and disputes; that the Cherokees should be reimbursed for all claims made against them by the United States and deducted from the $5,000,000 treaty fund; that the Western Cherokees should be reimbursed for the lands ceded by them by the treaty of 1828, out of the residuum of the sums arising out of the treaty of 1835. That is to say, from the $5,600,000 granted by the treaty of 1835 there should be deducted the investments and expenditures stipulated in article 15 of said treaty, and out of the residuum there should be paid to the Western Cherokees a sum equal to one-third, to be distributed to them per capita, and that in arriving at that residuum there should be charged for removal only $20 per capita and for subsistence $33.33 per capita, as provided by article 8 of the treaty of 1835. By article 9 the United States agreed to make a "fair and just settlement of all moneys due the Cherokees and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor." By article 11, in respect to the cost of removal and subsistence of the Eastern Cherokees under the treaty of 1835, it was agreed that the questions should be submitted to the Senate, by whose decision they agreed to abide.

In respect to the cost of subsistence the Senate decided that the United States should bear the expense, and there was accordingly restored to the treaty fund the sum of $189,422.76, but the provision requiring the United States to pay the cost of removal was rejected by the Senate. The treaty as thus modified and ratified was acquiesced in by the Indians. But the delay of the Government in causing a fair and just settlement to be made of all moneys due the Indians under the treaty of 1835, which by the treaty of 1846 the Government had agreed to make, caused dissatisfaction among the Indians, and they petitioned Congress to carry out the provisions of the treaty.

The account was finally stated by the Commissioner of Indian Affairs and on the basis of that report the Congress passed a joint resolution (9 Stat. L., 339) authorizing the accounting officers of the Treasury to make a just and fair settlement of the claims of the Cherokee, according to the principles of the treaty of 1846, and to make their report thereof at the next session of Congress, which was done, but no action was taken by Congress thereon. Later, however, by the act of February 27, 1851
(9 Stat. L., 573), Congress appropriated the sum of $724,603.37,
110 with interest thereon at the rate of 5 per cent per annum from June 12, 1838, until April 1, 1851. In the paragraph making the appropriation there was added this proviso:

"Provided, however, That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever

on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation; and, except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees: And provided further, That the money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of sixth August, eighteen hundred and forty-six."

In 1852, in conformity with the provision authorizing settlement to be made, the sum so appropriated, together with the further sum of $189,422.76 theretofore allowed for subsistence, making in all $912,026.13, was—though the Cherokee Nation entered its protest to the settlement on the basis proposed—paid to the Cherokees, for which a receipt was executed in full as provided in the act. Thus the long and persistent controversy between the Cherokee Nation and the United States was, notwithstanding said protest, supposed to be adjusted and settled as provided by the act.

If the matter had rested there the controversy between them would have been at an end, notwithstanding the protest of the Cherokee Nation. But on December 19, 1891, an agreement was entered into between the Government and the Cherokee Nation, by article 1 of which the Cherokee Nation agreed to cede to the United States 8,144,682.91 acres known as the Cherokee Outlet; and by article 2 it was agreed on behalf of the United States that for and in consideration of said cession the United States would (1) remove from the limits of the Cherokee Nation certain trespassers; (2) a certain article of the treaty of 1866 should be held for naught; (3) the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction in certain cases; (4) "The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying such treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States, in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amounts of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws which may be claimed to be omitted from, or unfairly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall, at its next session, after such case shall be finally
111 decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor, or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council; said appropriation to be made by Congress, if then in session, and if not, then at the next session immediately following such accounting;" (5) that certain citizens of the

Cherokee Nation should have the right to select lands as homesteads under certain conditions, and (6) that the United States should pay for said lands the sum of $8,300,000.

The other provisions of the treaty are not material to this case, but in transmitting the treaty the commissioners on the part of the United States reported to the President by way of explanation—doubtless to induce the ratification of the agreement—that in the relinquishment of the title to the land it was made a condition precedent that the United States should render to the Cherokee Nation a complete account of moneys due to the nation under treaties as stated in the fourth subdivision of article 2 above quoted, and this, they say, "because the Cherokees are compelled to accept the construction of the treaties made by the Executive and administrative branches of the Government," and that "Whatever that construction is, the Indians must abide by it," there being "no appeal except to Congress." The commissioners also reported that the Indians "claimed that upon a just accounting, upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them;" and that as the Government had kept the books and construed the treaties, no harm could come from restating the account, for if not theretofore correctly stated, "no possible reason can exist why the error should not be corrected." (Senate Ex. Doc. 56, 52d Cong., 1st sess., pp. 11 and 12.)

The agreement so entered into was approved by the Cherokee national council January 4, 1892, and ratified by the Congress by the act of March 3, 1893 (27 Stats. L., 640). By the same act the sum of $5,000 was appropriated "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement," set out above.

Therefore, as part consideration and inducement for the sale of the land, the United States agreed that they would without delay render "a complete account of moneys due the Cherokee Nation; and, in furtherance of the agreement and the appropriation therefor, such experts were appointed and an account was rendered, which was accepted by the Cherokee Nation, and its rights to sue in this court was thereby waived.

The Cherokees insisted upon the payment of the amount found due, but a question arose as to whether the experts had not exceeded their authority in so construing the treaties as to render the United States liable for the cost of the removal and then stating the account accordingly. It was contended then, and is now, that no question of law was submitted to them for decision; that they were merely to state the account as it existed, and this, it seems to me, is the correct view. The experts, however, in the account respecting the cost of removal, say:

"The cost of removal and subsistence prove to be very much
112 larger than was expected and provided for by the appropriation. The excess cost of subsistence over the amount appropriated has been refunded to the Cherokee Nation; but upon the assumption that the United States was (were) to pay the expense of removal there is due the Cherokee fund the sum of $1,111,284.70."

That amount, it will be noted, is stated as due upon the assumption of

the liability of the United States to pay the cost of removal. That liability the Congress desired determined, and for that purpose, in the act of July 1, 1902 (32 Stat. L., 717), making provision for the allotment of land to the Cherokee Nation and for other purposes, section 68 was incorporated in these words:

"SEC. 68. Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three and twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

Under that act the Cherokee Nation filed the petition herein claiming the several amounts stated in the account so rendered under the direction of the Secretary of the Interior as an award, and asked interest thereon at 5 per cent per annum from June 12, 1838. But doubts were entertained as to whether under that act the Eastern Cherokee could be made parties to the action, and so by the act of March 3, 1903 (32 Stat. L., 996), making appropriation for the Indian Department, section 68 was amended as follws:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensa-
113 tion for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Repre-

sentatives Executive Document Numbered Three hundred and nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be."

Under the amended section the Eastern Cherokees appeared by counsel and filed their petition, claiming that they were entitled to the amount stated in the account so rendered under the direction of the Secretary of the Interior for the cost of their removal to the Indian Territory, with interest thereon at 5 per centum from June 12, 1838. Still another class, known as Eastern and Emigrant Cherokees, appeared by counsel and filed their petition, in which they claimed one-fourth of the amount stated as the cost of removal of the Eastern Cherokees to the Indian Territory. Therefore, the Cherokee Nation, as well as the Eastern and all other Cherokees claiming any interest in the subject-matter of the litigation, appear to be in court as required by the jurisdictional act.

The claim thus referred to as "mentioned in H. R. Executive Document No. 309 of the second session of the Fifty-seventh Congress," is, as stated in the resolution of the House of Representatives, December 16, 1902, as follows: "The award rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893," and more particularly set forth in H. R. Executive Document No. 182, Fifty-third Congress, third session, pages 1, 32, and the findings of fact of the Court of Claims of April 28, 1892, which latter are substantially the findings of fact in the present case.

The foregoing findings of fact were made and reported to Congress in response to the resolution of the United States Senate referring to the court Senate bill No. 3681, providing for the payment of the award of the Secretary of the Interior in favor of the Cherokees under the provisions of the act of Congress of March 3, 1893. But in the latter part of the ninth finding, referring to the report of the experts Slade and Bender as to the amount charged to the treaty fund, the court said: "But whether said sum of one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70) was or was not improperly charged to the treaty fund, and whether interest should be allowed thereon, are questions of law upon which the court expresses no opinion."

Notwithstanding the report of the experts and the findings of the court were before the Congress, they did not see fit to make the appropriation to pay the amount found due, but instead referred the claim to the court for adjudication.

114 What, then, was referred to the court for adjudication? It is conceded in the court's opinion that the amount found due has none of the elements of an award nor of an account stated, but that as the rendition

of the account was made a part of the consideration for the sale of the Cherokee Outlet it is binding on the United States, and therefore the court can not go behind the account so rendered. That Congress did not take that view of the account is evident from their passage of the two acts conferring upon the court jurisdiction "to examine, consider, and adjudicate * * * any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States." The agreement of 1891, ratified by the Congress, respecting the rendition of an account, is that "The United States shall, without delay, render to the Cherokee Nation * * * a complete account of moneys due the Cherokee Nation under any of the treaties" therein referred to, and if the Cherokee council should "determine that such accounting is incorrect or unjust," the Cherokee Nation should then have the right, within twelve months, to enter suit in the Court of Claims against the United States. This it did not do, but instead accepted the account and thereby waived its right to sue. But were the United States bound to accept the account, based as it was upon the assumption of their liability under the several treaties? I think not, for the reason that the questions of law involved were not submitted to the experts for their decision by the appropriation authorizing their appointment, nor will the language of the agreement made the basis thereof bear such construction. The accounting contemplated by the agreement and for which the experts were appointed was a statement of the account as it actually existed between the United States and the Cherokee Nation; that is to say, to properly state the several claims of the Cherokee Nation and the payments made thereon by the United States. This they did not do, but upon the assumption of the liability of the United States to pay the cost of removal, stated a different account, and the result was the balance of $1,111,284.70 in favor of the Cherokee Nation, so that in my view of the case that question was left open by the experts for the court to deal with; but inasmuch as the Cherokee Nation accepted the account, though rendered upon the assumption of the liability of the United States, instead of bringing suit in the Court of Claims to have that question determined, it was left for the Congress to deal with, and hence the reference of the claim to this court. The jurisdiction of the court to determine that question is not controverted.

In my view of the case, as before stated, the supplementary articles to the treaty of 1835 operated to modify article 15 thereof by eliminating therefrom the word "removal," and with that word eliminated the United States were liable under the treaty of 1835 for the expense of removing the Eastern Cherokees to the Indian Territory; and such was evidently the view of Congress by the act of June 12, 1838, making appropriation to pay the sum estimated by the Secretary of War as necessary to defray the expenses of removal and subsistence hereinbefore referred to, in which, in the same paragraph, it is recited that "No part of said money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty" (1835). That language seems to justify the views I have expressed and may well be considered in its effect as
115 a legislative construction of the treaty of 1835. In addition thereto Congress made appropriations to pay the entire cost of subsisting the Cherokees for one year after their removal to the Indian

Territory, notwithstanding the cost thereof, as stated in article 15 of the treaty of 1835, was to be deducted from the treaty fund the same as the cost of removal.

I therefore reach the conclusion that the assumption of the experts, that the United States were liable for the cost of removal, was well founded, and that the account rendered by them upon that theory is correct, as conceded by the defendants.

The next question is, To whom should the money be paid? It is conceded that the Cherokee Nation is entitled to recover under the treaty of 1819 and the treaty of 1866, and also certain interest under the act of Congress of March 3, 1893, the several sums set forth in the report of the experts, the disposition of each of which is correctly dealt with in the opinion of the court.

In respect to the sum of $1,111,284.70 for the expense of moving the Eastern Cherokees to the Indian Territory, that sum, if it had not been charged to the treaty fund, would, under the provisions of article 15 of the treaty of 1835, have been "equally divided among all the people belonging to the Cherokee Nation east, according to the census just completed," while the ninth article of the treaty of 1846, after providing for deductions for money properly expended under the treaty of 1835, provides that:

"The balance thus found to be due shall be paid over, per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

Hence whatever sums were properly chargeable under the treaty of 1835 were also chargeable under the ninth article of the treaty of 1846, and the balance remaining was to be equally divided as above stated; while in respect to those Cherokees remaining east it was expressly provided by article 10 of the treaty of 1846—though they were not parties thereto—that nothing in said treaty "shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi River had, or may have, under the treaty of 1835 and the supplement thereto."

But by article 4 of the treaty of 1846 it is provided, in respect of the Western Cherokees, that in consideration of the cession by them of their interest in the lands east and west of the Mississippi River, including the 8,088,889 acres ceded by the treaty of 1835—all of which was to remain the common property of the whole Cherokee people—after all the investments and expenditures properly chargeable to the $5,606,632 granted by the treaty of 1835 had been deducted, that a sum equal to one-third part of said residuum should be distributed per capita to each individual of the Western Cherokees, and that in estimating the expense of removal and subsistence of the Eastern Cherokees the sum stipulated as commutation therefor in article 8 of the treaty of 1835 be adopted.

Inasmuch, therefore, as the cost of removal, $1,111,284.70, was charged to the treaty fund in the settlement thus made, the Cherokees, both east and west, received less than they would have received but for such deduction. Hence, when that sum is restored to the treaty fund

the whole Cherokee people will be entitled to share in the sum so
116 restored the same as they would have been at the time of the treaty of 1846, plus whatever interest may now be added thereto.

The sum thus restored becomes a trust fund in the hands of the United States, not for the purpose of investment nor to be held by them, but for the sole purpose of distributing the same to the Cherokee people as provided by the treaties of 1835 and 1846.

By Revised Statutes, section 1091, this court is inhibited from allowing interest on any claim "unless upon a contract expressly stipulating for the payment of interest." There is no provision in either of the treaties of 1835 or 1846 respecting the payment of interest, except on the specific sums to be invested as provided by the treaty of 1835, and the court must therefore look elsewhere for authority, if interest is to be allowed.

No interest can be allowed on the sum under Revised Statutes, section 2096, as the same was not received under a treaty containing a stipulation for the payment of annual interest, but on the contrary was to be expended in defraying the cost of removal, etc. Nor can interest be allowed under Revised Statutes, section 2108, as the money is not going to incompetent or orphan Indians. Nor can interest be allowed under Revised Statutes, section 3659, as no interest has accrued thereon allowable by this court, nor has the sum been invested in stocks of the United States or other interest-bearing securities.

As the act of February 27, 1851, supra, under which the settlement of 1852 was made, authorized the payment of interest from June 12, 1838, to April 1, 1851, on the sum appropriated, it may fairly be assumed that if the sum of $1,111,284.70 now in controversy had then been settled, interest would have been paid thereon as provided by the act. But that act has performed its office and the court can not look thereto for the payment of interest, even for the period stated, so that I have grave doubts as to whether there is any provision of law authorizing the court to allow interest on said sum, however much I may think it ought to be allowed; but for the purposes of this case I will assume the allowance of interest and the correctness of the distribution, as set forth in the court's opinion.

WRIGHT, J., dissenting:

I do not concur in the opinion nor the conclusion of the majority of the court concerning the expense of the removal of the Indians. It is not strictly accurate to say that the $1,111,284.70 of the Slade and Bender account is part consideration for the sale of the Outlet, for that item had no existence until Slade and Bender made an account that was never in the records.

The stipulation relative to the existing dispute about the subject of removals was part of the agreement for such sale, and to that extent may be treated as entering into the inducement or consideration for such sale, but the rights of the parties created by the contract could not be enlarged nor abridged, without the consent of both, by the agents of either, while assuming to carry out the provisions of the agreement.

All that was contemplated by the fourth subdivision of article 2 of the agreement of December 19, 1891, was a statement of the account of

moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868, and any laws passed by the Congress for the purpose of carrying said treaties, or any of them, into effect. Upon such accounting being
117 made the Cherokee Nation was given the right within twelve months to enter suit in this court not for any moneys appearing to be due upon the accounting, but for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation under any of the treaties or laws which might be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; or, if it should be found upon said accounting that any sum of money had been so withheld, the amount should be duly appropriated by Congress.

What manifestly was intended by the agreement was that the United States was to state, first, the moneys due to the Cherokee Nation under the treaties specified and the laws passed to carry them into effect, and, second, the disposition in fact made of such moneys—not what ought to have been done, but what was done. In other words, the account should state the various sums so appropriated, so that it would appear in a precise and compact form how much money was due the Cherokee Nation under the treaties and laws mentioned and the disbursements thereof in fact made by the United States.

This was the view taken by the Interior Department, before Congress ratified the treaty, in the report of the Commissioner of Indian Affairs, communicated to Congress, and upon which was made the appropriation of March, 1893, of $5,000 to employ such expert persons to properly render a complete account to the Cherokee Nation of moneys due, as required in the fourth subdivision of article 2 of the agreement. The report upon which the Congress acted in making such appropriation in effect stated that it seemed the intention of the parties to the agreement that what was required was a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under treaties and acts of Congress, and that being true it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century, and to prepare a statement of that kind it would require an appropriation of at least $5,000 to pay for the services of an expert accountant and assistants, and in the draft of the bill for the ratification of the agreement for the purchase of the Outlet the appropriation was provided for as recommended, thus proving by the act of ratification itself that Congress intended to require in such accounting only "a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress." Nothing was intimated or stated that the accountants were authorized to do more than to review and copy the accounts and records running back nearly a century. No authority was given to change the accounts, but to copy them.

The defendants agreed to inform the Cherokee Nation how much money was due to them under the various treaties and laws, and how much, for what purpose, and in what manner it had been paid out, thus forming a basis for the nation to come into this court and bring suit not merely for

a sum or balance appearing to be due on the face of such account, but to dispute the account, allege and declare an amount of money promised and withheld, or, in other words, that the United States had diverted or misappropriated an alleged amount, and upon such allegation this court was given jurisdiction to decide and give its judgment.

Slade and Bender, the accountants, mistook their authority;
118 however, and usurped the jurisdiction conferred upon this court and decided the questions intended for this court. They did not merely state the facts of the account as they existed, but changed the facts and undertook to state the account as they thought it ought to have been made. Their account was not the account of the defendants but the account they believed the defendants should have made instead. They substituted a different account for the one they were authorized to state.

It has been argued that the Secretary of the Interior by transmitting the Slade and Bender account to the Cherokee Nation thereby ratified and gave it effect. This can not be, for the plain reason that he was not the agent of the United States for such a purpose. The only authority conferred upon that officer was to employ such expert person or persons to properly render a complete account as required in the fourth subdivision of article 2 of the agreement.

It ought to require no argument to prove that beyond a mere statement of the existence of the account as in fact kept by the Government, a true exhibit thereof, the accounting of Slade and Bender is of no effect whatever. By their attempt to enter upon the jurisdiction so manifestly intended for this court they misled the Cherokee Nation, and thwarted the intention of the parties to obtain an early adjudication of the matters now before the court. As soon as this report was called to the attention of Congress it was repudiated, and the matter was again referred to this court in the form now existing, and the case is wholly unaffected by the report of Slade and Bender except in so far as it exhibits the true state of the account, the record of the facts and acts of the Government as they actually occurred at the respective times of the various transactions.

By setting aside the accounting of Slade and Bender as respects the charge for removals, we would be brought to a consideration of the case upon its merits, namely, the liability of the defendants for removals under the stipulations of the treaty of 1835. No subsequent act of Congress changed the treaty in this respect. The appropriations made for such purpose were, in view of the provisions of the treaty, mere gratuities, and did not bind the defendants to assume further liabilities. Congress might do so if they saw fit, but no legal obligation was assumed in that regard. Plaintiffs are now here claiming under the treaty of 1835, and it is familiar doctrine that they can not at the same time both claim under and repudiate its provisions. That the treaty of 1835, unchanged as it is, charged the expense of the removals to the plaintiffs is too plain for argument, as will appear by reading it within its four corners.

If the conclusion reached by the majority of the court is to be accepted as the final award of the moneys claimed in this suit, it will prove the futility of accomplishing any settlement of disputed matters by the mutual agreement of the parties.

Under the provisions of the act of 1851, in the year 1852 $912,026.13 was paid to and accepted by the Cherokee Nation with the express condition that the same should be in full satisfaction and in final settlement of all claims and demands whatsoever under any treaty theretofore made, with certain exceptions in which the present claim is not included. This settlement was fairly entered into and acquittance executed by the plaintiffs in conformity to the provisions of the act mentioned. No reason appears against the validity and binding force of the compromise, and there is none.

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THE CHEROKEE NATION v. THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN CHEROKEES v. THE UNITED STATES.	No. 23214.	
THE EASTERN AND EMIGRANT Cherokees v. THE UNITED STATES.	No. 23212.	

XIII.—Findings of fact and conclusions of law, filed May 18, 1905.

FINDINGS OF FACT.

The above consolidated causes having come on to be heard upon the pleadings and proofs, and having been argued by counsel, were submitted to the court for its decision, and the court being now here sufficiently advised in the premises finds the facts as established by the evidence in said consolidated causes to be as follows:

I.

Section 68 of the act of Congress of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation and for the disposition of town sites therein described, and for other purposes" (32 Stat., 726), is as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the
120 case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the

employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

The act of March 3, 1903, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes" (32 Stats., 996), contains the following provisions:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive Document Numbered Three hundred and nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in said H. R. Ex. Doc. No. 309, 57th Cong., 2d sess., is therein referred to and described as follows:

"Resolved, That the Attorney-General of the United States is hereby requested to advise the House of Representatives, with all convenient speed, in the case of the Eastern Cherokees against the United States, whether or not the award rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893, as set forth in H. R. Ex. Doc. No. 181, 53d Cong., 3d sess., and
121 the findings of fact of the Court of Claims of April 28, 1902, is
res adjudicata; to review the opinion of the Department of Justice of December 2, 1895, and advise the House of Representatives whether the reasons set forth in that opinion now constitute a valid defense for the payment of said award."

II.

Prior to the year A. D. 1808 the Cherokee Nation of Indians was domiciled in Georgia, Alabama, Tennessee, North Carolina, and South Carolina, where they owned and possessed about 14,000,000 of acres of land. In that year deputations from the upper and lower Cherokee towns, duly authorized by their nation, went to the city of Washington, the deputies of the former to make known to the President of the United States the anxious desire of those whom they represented to engage in the pursuits of agriculture and civilized life in the country which they then occupied, and to request the establishment of a division line between the upper and lower towns, so that they might the more readily begin the establishment of fixed laws and a regular government; the deputies of the latter to make known to the President their desire to continue the hunter life, and, owing to the scarcity of game where they then lived, their wish to remove across the Mississippi River on some vacant lands of the United States.

After maturely considering the petitions of both parties, on January 9, 1809, the President answered the same, saying that—

"The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who wish to remove are permitted to send an exploring party to reconnoiter the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of those rivers. * * *

"When this party shall have found a tract of country suiting the emigrants and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right."

Relying on the promises of the President of the United States, as above recited, the Cherokees who wished to remove explored the country on the west side of the Mississippi and made choice of and settled themselves down upon United States lands on the Arkansas and White rivers, to which no other tribe of Indians had any just claim, and subsequently sent their agents, duly empowered to execute a treaty relinquishing to the United States all their right, title, and interest to all lands which they had left, or which they were about to leave, and belonging to them as a part of the Cherokee Nation, in all of which lands, proportioned to their numbers, they had an equal right.

To the treaty of cession, which was subsequently entered into on the 8th day of July, 1817, the chiefs, headmen, and warriors of the Cherokee Nation east of the Mississippi, as well as the chiefs, headmen, warriors, and deputies of the Cherokees on the Arkansas River, were parties.

122 By article 1 of said treaty "the chiefs, headmen, and warriors of the whole Cherokee Nation" ceded to the United States certain lands described therein, "in part of the proportion of land in the Cherokee Nation east of the Mississippi River, to which those now on the Arkansas and those about to remove there are justly entitled."

By article 2 said chiefs, headmen, and warriors also ceded to the United States other lands therein described.

"ART. 4. The contracting parties do also stipulate that the annuity due from the United States to the whole Cherokee Nation for the year one thousand eight hundred and eighteen is to be divided between the two parts of the nation in proportion to their numbers, agreeably to the stipulations contained in the third article of this treaty, and to be continued to be divided thereafter in proportion to their numbers; and the lands to be apportioned and surrendered to the United States agreeably to the aforesaid enumeration, as the proportionate part, agreeably to their numbers, to which those who have removed and who declare their intention to remove have a just right, including these with the lands ceded in the first and second articles of this treaty.

"ART. 5. The United States bind themselves, in exchange for the lands ceded in the first and second articles hereof, to give to that part of the Cherokee Nation on the Arkansas as much land on said river and White River as they have or may hereafter receive from the Cherokee Nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas, agreeably to their numbers; which is to commence on the north side of the Arkansas River at the mouth of Point Remove, or Budwell's old place; thence by a straight line northwardly to strike Chataunga Mountain, or the hill first above Shield's ferry, on White River, running up and between said rivers for complement, the banks of which rivers to be the lines; and to have the above line from the point of beginning to the point on White River run and marked, which shall be done soon after the ratification of this treaty; and all citizens of the United States, except Mrs. P. Lovely, who is to remain where she lived during life, removed from within the bounds as above named. And it is further stipulated that the treaties heretofore between the Cherokee Nation and the United States are to continue in full force with both parts of the nation and both parts thereof entitled to all the immunities and privilege which the old nation enjoyed under the aforesaid treaties, the United States reserving the right of establishing factories, a military post, and roads within the boundaries above defined.

"ART. 6. The United States do also bind themselves to give to all the poor warriors who may remove to the western side of the Mississippi River one rifle gun and ammunition, one blanket, and one brass kettle, or in lieu of the brass kettle a beaver trap, which is to be considered as a full compensation for the improvements which they may leave, which articles are to be delivered at such point as the President of the United States may direct; and to aid in the removal of the emigrants they further agree to furnish flat-bottomed boats and provisions sufficient for that purpose; and to those emigrants whose improvements add real value to their lands the United States agree to pay a full valuation for the same, which is to be ascertained by a commissioner appointed by the President of the United States for that purpose, and paid for as soon after the
123 ratification of this treaty as practicable. The boats and provisions promised to the emigrants are to be furnished by the agent on the Tennessee River, at such time and place as the emigrants may notify him of, and it shall be his duty to furnish the same.

* * * * * * *

"ART. 11. It is further agreed that the boundary lines of the lands ceded to the United States by the first and second articles of this treaty, and the boundary line of the lands ceded by the United States in the fifth article of this treaty, is to be run and marked by a commissioner or commissioners appointed by the President of the United States, who shall be accompanied by such commissioners as the Cherokees may appoint, due notice thereof to be given to the nation." (Treaty of July 8, 1817, between the United States and Cherokee Nation; 7 Stat. L., 156. Indian Affairs. Laws and Treaties (1903), vol. 2, p. 96.

III.

February 27, 1819, a treaty was entered into between the United States and the "chiefs and headmen of the Cherokee Nation of Indians, duly authorized and empowered by said nation," the preamble of which is as follows:

"Whereas a greater part of the Cherokee Nation have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, signed the eighth of July, eighteen hundred and seventeen, might, without further delay or the trouble or expense of taking the census, as stipulated in the said treaty, be finally adjusted, have offered to cede to the United States a tract of country at least as extensive as that which they probably are entitled to under its provisions, the contracting parties have agreed to and concluded the following articles."

By Article I the Cherokee Nation cedes to the United States the lands therein described, and the parties mutually declare "that the lands hereby ceded by the Cherokee Nation are in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their nation who have or may hereafter emigrate to the Arkansas; and this treaty is a final adjustment of that of the eighth of July, eighteen hundred and seventeen."

By Article VI of said treaty it was estimated that the Cherokees who had emigrated and those who had enrolled for emigration together constituted one-third part in numbers of the whole nation. (7 Stats., 195. Indian Affairs. Laws and Treaties, vol. 2, pp. 124, 126.)

IV.

On May 6, 1828, the United States entered into a treaty with the "Cherokee Nation of Indians west of the Mississippi," the preamble of which is as follows:

"Whereas, it being the anxious desire of the Government of the United States to secure to the Cherokee Nation of Indians, as well those now living within the limits of the Territory of Arkansas as
124 those of their friends and brothers who reside in States east of the Mississippi and who may wish to join their brothers of the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around

it the lines or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and

"Whereas the present location of the Cherokees in Arkansas being unfavourable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by treaty, and resting also upon the pledges given them by the President of the United States and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the west, and, as may be seen on referring to the records of the War Department, still being anxious to secure a permanent home and to free themselves and their posterity from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexions in future; and

"Whereas it being important, not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas, whenever it may become a State, of either or both of those tribes, the parties hereto do hereby conclude the following articles, viz."

Article 1 defines the western boundary line of Arkansas.

"ART. 2. The United States agree to possess the Cherokees and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land," all west of the western boundary of Arkansas and bounded as therein set forth, and "In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extend."

"ART. 3. The United States agree to have the lines of the above cession run without delay," and "to remove immediately after the running of the eastern line from the Arkansas River to the southwest corner of Missouri, all white persons from the west to the east of said line * * * and also to keep all such from the west of said line in future."

By article 5 it was agreed "that the United States, in consideration of the inconvenience and trouble attending the removal, and on account of the reduced value of a great portion of the land herein ceded to the Cherokees, as compared with that of those in Arkansas which were made theirs by the treaty of 1817 and the convention of 1819, will pay to the Cherokees, immediately after their removal, which shall be within fourteen months of the date of this agreement, the sum of fifty thousand dollars; also an annuity for three years of two thousand dollars, towards defraying the cost and trouble which may attend upon going after and recovering their stock, which may stray into the Ter-
125 ritory in quest of the pastures from which they may be driven; also eight thousand seven hundred and sixty dollars for spoliations committed on them (the Cherokees), which sum will be in full of

all demands of the kind up to this date," * * * and "to pay two thousand dollars annually to the Cherokees for ten years, to be expended under the direction of the President of the United States in the education of their children in their own country, * * * also one thousand towards the purchase of a printing press and type." * * *

"ART. 7. The chiefs and headmen of the Cherokee Nation aforesaid, for and in consideration of the foregoing stipulations and provisions, do hereby agree, in the name and behalf of their nation, to give up, and they do hereby surrender, to the United States, and agree to leave the same within fourteen months, as hereinbefore stipulated, all the lands to which they are entitled in Arkansas and which were secured to them by the treaty of 8th January (July), 1817, and the convention of the 27 February, 1819.

"ART. 8. The Cherokee Nation, west of the Missis'ppi, having by this agreement freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and to their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States east of the Mississippi, who may desire to remove west, shall be given, on enrolling himself for emigration, a good rifle, a blanket and kettle, and five pounds of tobacco; (and to each member of his family one blanket), also a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation, and support by the way, and provisions for twelve months after their arrival at the agency; and to each person, or head of a family, if he take along with him four persons, shall be paid immediately on his arriving at the agency and reporting himself and his family or followers as emigrants and permanent settlers, in addition to the above, provided he and they shall have emigrated from within the chartered limits of the State of Georgia, the sum of fifty dollars, and this sum in proportion to any greater or les number that may accompany him from within the aforesaid chartered limits of the State of Georgia.

Pursuant to the terms of this treaty, the Cherokee Nation, west of the Mississippi, peaceably removed from their lands on the Arkansas and White rivers, in the Territory of Arkansas, to the lands newly ceded to them in the Indian Territory. The moneys agreed to be paid to them under the fifth article have been fully paid, and no claim is now made on such account. (7 Stats., 311; Ind. Affairs, Laws, and Treaties, vol. 2, pp. 206–208; H. R. Ex. Doc. 182, 53d Cong., 3d sess., 4; Red Book, p. 65.)

126 V.

By treaty of February 14, 1833, between the United States and the "chiefs and headmen of the Cherokee Nation of Indians west of the

Mississippi," a change in the boundary lines of the lands ceded under the treaty of 1828 was agreed upon to adjust a conflict with the grant previously made to the Creek Indians, and by article 1 of said treaty of 1833 the United States, in addition to renewing its guarantee and pledge of 7,000,000 acres of land to the Cherokees, further agreed that—

"In addition to the seven million of acres of land thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend, * * * and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed."

By article 5 of said treaty it was provided that—

"These articles of agreement and convention are to be considered supplementary to the treaty before mentioned between the United States and the Cherokee Nation west of the Mississippi, dated sixth of May, one thousand eight hundred and twenty-eight, and not to vary the rights of the parties to said treaty any further than said treaty is inconsistent with the provisions of this treaty now concluded, or these articles of convention or agreement." (7 Stats., 414; Ind. Affairs, Laws, and Treaties (1903), pp. 283, 285.)

VI.

On or about February 28, 1835, a delegation of the Cherokee Nation east of the Mississippi, having full power and authority to conclude a treaty with the United States, stipulated and agreed with the Government of the United States to submit to the Senate the matter of the amount which should be allowed to their nation for their claims and for a cession of their lands east of the Mississippi River, agreeing for themselves to abide by the award of the Senate of the United States, and to recommend the same to their people for their final determination.

The Senate, on March 6, 1835, by resolution, advised that "a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River."

The Cherokee delegation, after the award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty, but they declined to do so, insisting that the Senate had been misled to the injury of the Cherokees, and that the matter of said award "should be referred to their nation and there, in general council, to deliberate and determine on the subject in order to insure harmony and good feeling among themselves." (7 Stats., 478; Ind. Affairs (1903), p. 324; Sen. Ex. Doc. 215, 56th Cong., 1st sess., p. 77.)

On or about March 14, 1835, a certain other delegation of Cherokees,
who represented that portion of the nation east, who were in favor
127 of emigrating to the Cherokee country west of the Mississippi, but
had no authority or power from the nation generally, entered into propositions for a treaty with John F. Schermerhorn, commissioner on the part of the United States, which they agreed to submit to the nation for final action and determination.

Among other things included in the draft of the proposed treaty, it

was proposed that the sum of $5,000,000 should be paid to the members of the Cherokee Nation east for their lands and possessions in accordance with the above-quoted resolution or "award" of the Senate, but it was further proposed that there should be deducted from said five millions the sum of $255,000 to defray the expenses of removing the members of the nation to the west. (Sen. Ex. Doc. 215, 56th Cong., 1st sess., pp. 81–82.)

The proposed treaty was unanimously rejected by the Cherokee national council for the reason that the expense of removal was thereby proposed to be deducted from the fund of $5,000,000. (Sen. Ex. Doc. 215, 56th Cong., 1st sess., p. 83; Sen. Ex. Doc. 120, 25th Cong., 2d sess., 459.)

During the consideration of this proposed treaty by the Cherokee council members thereof a letter from President Jackson, bearing date March 16, 1835, was read to them, purporting to explain the proposed treaty. That letter is as follows:

"I shall in the course of a short time appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you more fully my views and the nature of the stipulations which are offered to you.

"These stipulations provide—

"1st. For an addition to the country already assigned to you west of the Mississippi, and for the conveyance of the whole of it by patent in fee simple, and also for the security of the necessary political rights, and for preventing white persons from trespassing upon you.

"2d. For the payment of the whole value to each individual of his possessions in Georgia, Alabama, North Carolina, and Tennessee.

"3d. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of one hundred and fifty dollars to each person.

"4th. For the usual supply of rifles, blankets, and kettles.

"5th. For the investment of the sum of four hundred thousand dollars, in order to secure a permanent annuity.

"6th. For adequate provisions for schools, agricultural instruments, domestic animals, missionary establishments, the support of orphans, etc.

"7th. For the payment of claims.

"8th. For granting pensions to such of your people as have been disabled in the service of the United States.

"These are the general provisions contained in the arrangement. But there are many other details favorable to you which I do not stop here to enumerate, as they will be placed before you in the arrangement itself. Their total amount is four million five hundred thousand dollars, which, added to the sum of five hundred thousand dollars, estimated as the value of the additional land granted you, makes five millions of dollars—a sum, if equally divided among all your people east of the Mississippi, estimating them at ten thousand, which I believe is their full number, would
128 give five hundred dollars to every man, woman, and child in your nation. There are few separate communities whose property if divided would give to the persons composing them such an amount." (Senate Doc. 215, 56th Cong., 1st sess., 82.)

VII.

December 29, 1835, a treaty was drawn up between the United States and the "Chiefs, headmen, and people of the Cherokee tribe of Indians," which treaty is commonly called the "Treaty of New Echota."

Neither the "Western Cherokees," or "Old Settlers," nor the great body of the "Eastern Cherokees" were parties to this treaty, and they at all times up to the making of the treaty of 1846 repudiated it on the ground that its execution had not been authorized by them or their representatives in council.

The small number of Cherokees east of the Mississippi who negotiated the treaty were called or styled the "Treaty Party."

It was provided, among other things, by this treaty, as follows:

"ARTICLE 1. The Cherokee Nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi River, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles. But as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised 'that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River' have included and made any allowance or consideration for claims for spoliations, it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision, and if no allowance was made for spoliations, that then an additional sum of three hundred thousand dollars be allowed for the same."

ART. 2. That as it was apprehended that the lands west of the Mississippi which the United States by treaty of May 6, 1828, and supplemental treaty of February 14, 1833, guaranteed and secured to be conveyed by patent "to the Cherokee Nation of Indians" did not contain a sufficient quantity of land for the accommodation of the whole nation on their removal west, the United States, in consideration of $500,000, agreed to convey to said Indians by patent in fee simple a further tract of land, estimated to contain 800,000 acres.

ART. 3. The lands ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty should be included in one patent executed to the Cherokee Nation of Indians by the President of the United States.

"ART. 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as, in the opinion of the
129 emigrating agent, are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of

their family and, in lieu of their one year's rations, they shall be paid the sum of thirty-three dollars and thirty-three cents, if they prefer it.

"Such Cherokees also as reside at present out of the nation shall remove with them in two years west of the Mississippi and shall be entitled to an allowance for removal and subsistence as above provided.

"ART. 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, removal subsistence, and debts and claims upon the Cherokee Nation and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national fund provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrolment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east, they shall also be paid for their improvements according to their approval value before their removal where fraud has not already been shown in their valuation."

By article 16 it was stipulated that the Cherokees should remove to their new homes within two years from the ratification of this treaty.

The leaders of the treaty party who had signed the treaty of 1835 contended that the sum of $5,000,000 was not intended to include the amount which might be required to remove them.

On March 1, 1836, the President submitted to the Senate the following supplementary articles, which were adopted as part of the treaty:

"ARTICLE 1. It is therefore agreed that all the preemption rights and reservations provided for in articles 12 and 13 shall be and are hereby relinquished and declared void.

"ART. 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question, and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above-mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provision should be made therefor as might appear to the Senate to be just.

"ART. 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions, and of the sum of three hundred thousand
130 dollars for spoliations described in the 1st article of the above-mentioned treaty. This sum of six hundred thousand dollars

shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

"But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate, and if they shall approve the same then this supplement shall remain part of the treaty."

The treaty and the supplementary articles were ratified and adopted as one instrument and proclaimed May 23, 1836.

VIII.

The Cherokee Indians who removed west of the Mississippi prior to May 23, 1836, were called "Western Cherokees." After the removal, under the treaty of 1835–36, of the Cherokees who had remained in the Cherokee country east of the Mississippi to the lands west of the Mississippi, the term "Western Cherokees" was no longer distinctive, and the Cherokees who had theretofore been known as such were thereafter popularly known as "Old Settlers."

The Cherokees who were domiciled east of the Mississippi River at the time of the making of the treaty of 1835–36, according to the census just then completed, were thereafter known as "Eastern Cherokees," the great body of whom subsequently, in 1838, moved to the lands west of the Mississippi.

IX.

Subsequent to the treaty of 1828, and prior to the signing of the treaty of December 29, 1835, almost continuous efforts had been made to induce the Cherokee people east to remove to the Indian Territory, but without success. Under the provisions of said treaty of 1835, practically nothing was accomplished in such direction until the summer of 1838, when the Cherokee Nation east yielded to superior force, and, under the supervision and direction of their own leaders, emigrated west of the Mississippi to the lands theretofore ceded to the Cherokee Nation west. (Red Book, p. 65.)

X.

The sum of $5,580,000 provided for by the supplementary articles of the treaty of 1835–36 was estimated to be more than sufficient to pay the cost of removal and all claims of every nature and description against the Government of the United States not otherwise provided for in said treaty, and it was therefore provided that whatever surplus might remain after removal and payment of claims should be turned over and belong to the education fund. (7 Stat., 486.)

On July 2, 1836, Congress confirmed the action of the Senate, as evidenced by the supplementary articles of said treaty, and appropriated, according to the terms of the third supplementary article, heretofore quoted, $600,000 for the removal of the Cherokees and for spoliations.

This sum proved to be insufficient for the purposes for which it was appropriated.

131 The treaty of December 29, 1835, was refused recognition by the great body of the Cherokees. They protested against it through their constituted authorities on numerous occasions and refused to give it any recognition, declared it to be unauthorized by the Cherokee people and a fraud on the United States. (Sen. Ex. Doc. 392, 56th Cong., 1st sess., pp. 7–10.)

The Cherokees having made no preparations to remove, as required by the terms of the treaty of 1835, Gen. Winfield Scott, with an army of men in May, 1838, placed them in camps of concentration under military control, preparatory to their removal by force. Thereupon, John Ross sought to make a treaty with the United States, but his overtures were rejected and the removal of the Cherokees by force was insisted upon by the United States, except in the alternative that the Indians would agree to remove themselves peaceably.

In the latter part of May, 1838, the President transmitted to Congress a letter bearing date May 18, 1838, from the Secretary of War to John Ross, principal chief of the Cherokee Nation, wherein the following appears:

"If it be desired by the Cherokee Nation that their own agent should have charge of their emigration, their wishes will be complied with and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect; with regard to the expense of this operation which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made of Congress."

This last communication was transmitted to Congress, and on May 23, 1838, the House of Representatives, by resolution, required a statement of the further amount necessary to pay for the removal and subsistence of the Cherokees (ibid., 78). On May 25, 1838, the Secretary of War submitted an estimate to the Speaker of the House of Representatives "of the amount that would be required" to remove 15,840 Cherokees and to subsist 18,756 Cherokees, stating that the further sum necessary for this purpose was $1,047,087 (ibid., 78), and on June 12, 1838, Congress appropriated this amount, with the proviso that no part of it should be deducted from the $5,000,000 fund. (5 Stat. L., p. 242; Finding VI, Cong., 10386.)

XI.

The appropriation of June 12, 1838, for the removal of the Cherokees, was used in part to meet the expenses of removing certain fugitive Creeks then living among them. The Cherokee council, by resolution of July 21, 1838, authorized John Ross to undertake the self-emigration of the Cherokees, under what they claimed to be the "special understanding with the Hon. Secretary of War," that such emigration should be at the expense of the United States, and by resolution of July 26, 1838, authorized Ross and associates to arrange for "the payment of such sums of money by the United States as might be necessary for the removal" "of the Cherokee people."

The Cherokee council, about the same time and before the payment of any money, passed a resolution on August 1, 1838, declaring that they did not recognize the treaty of New Echota, and that they would
132 not in any manner give their sanction or approval of it. (Record, pp. 213, 215, 217.)

The amount appropriated by Congress June 12, 1838, for the "object specified in the third supplementary article of the treaty with the Cherokees in 1835" for removal expenses, etc., to wit, $1,047,067, remained untouched in the Treasury on January 1, 1839, as appears from the books of the United States Treasury. (Receipts and Expenditures 1839, p. 260.)

XII.

The cost of the removal of the Eastern Cherokees from Georgia to the Indian Territory, paid and expended by the United States, was $1,495,485.92, which amount was obtained as follows:

From the $600,000 appropriated July 2, 1836	$335,165.91
From the $1,047,067 appropriated June 12, 1838	49,065.31
From the $500,000,000 appropriated July 2, 1836	1,111,284.70
Total	1,495,485.92

(Sen. Ex. Doc. 215, 56th Cong., 1st sess., p. 95; Finding V, Cong. 10386.)

That portion of the cost of subsisting the Eastern Cherokees after their arrival in the Indian Territory, which was at first deducted by the United States from the $5,000,000 treaty fund, was subsequently refunded and paid to the Cherokees, as hereinafter shown. (Finding IV, Cong., 10386.)

Of said amount of $1,495,485.92 paid by the United States for the removal of the Eastern Cherokees from Georgia to the Indian Territory, as set forth above, $137,740 was paid for the removal of 2,200 of such Cherokees who had voluntarily emigrated (27 C. Cls. Reports, p. 3, Finding III) at a cost to the Government of $61.70 per capita (Senate Doc. No. 215, 56th Cong. 1st sess., p. 78), and $1,357,745.92 were paid to John and Lewis Ross for the removal of the main body of the remainder of such Cherokees in 1838 (Senate Doc., supra).

The amount of $1,111,284.70, charged against the $5,000,000 fund, as before set forth, still remains charged against that fund (Senate Doc. 215, 56th Cong., 1st sess., p. 95). (Finding V, Cong., 10386.)

XIII.

After the removal of the Eastern Cherokees to the lands west of the Mississippi certain leaders of both the Western and Eastern Cherokees met at Illinois Camp Grounds and there, on July 12, 1838, entered into an "Act of Union between the Eastern and Western Cherokees," which is as follows:

"Whereas our fathers have existed as a separate and distinct nation in the possession and exercise of the essential and appropriate attributes of sovereignty from a period extending into antiquity, beyond the records and memory of man; and whereas these attributes, with the rights and franchises which they involve, remain in full force and virtue, as do also the national and social relation of the Cherokee people to each other

and to the body politic, excepting in those particulars which have grown
out of the provisions of the treaties of 1817 and 1819 between the
133 United States and the Cherokee Nation, under which a portion of
our people removed to this country and became a separate community (but the force of circumstances have recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured adapted to their present condition, and providing equally for the protection of each individual in the enjoyment of all his rights:

"Therefore we, the people composing the Eastern and Western Cherokee Nation, in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic under the style and title of the Cherokee Nation.

"In view of the union now formed, and for the purpose of making satisfactory adjustment of all unsettled business which may have arisen before the consummation of this union, we agree that such business shall be settled according to the provisions of the respective laws under which it originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major-General Scott for their removal to this country shall continue in charge of that business, with their present powers, until it shall be finally closed; and, also, that all rights and titles to public Cherokee lands on the east or west of the River Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers our derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation as constituted by this union.

"Given under our hands at Illinois camp grounds this twelfth day of July, 1838.

"By order of the national convention:

"GEORGE LOWRY,
"*President of the Eastern Cherokees.*

his
"GEORGE X GUESS,
mark
"*President of the Western Cherokees.*"

(117 U. S., 303–305.)

On the 6th of September following, the Cherokees who had agreed upon the union adopted a constitution of government which, after reciting that the Eastern and Western Cherokees had become reunited in one body politic under the style and title of the Cherokee Nation, proceeds as follows:

"The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens, respectively, who made or may rightfully be in possession of them: Provided, That the citizens of the nation, possessing exclusive and indefeasible rights to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in

any manner whatever to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove
134 with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation, on memorializing the national council for such readmission." (117 U. S., 305.)

At a meeting of the Cherokee people held at Tahlequah, in the Cherokee Nation, on January 16, 1840, the following declaration was made:

"Whereas a meeting of the Cherokee people was agreed on and requested by the United States agent and the assistant principal chief and others, on the 15th instant, at this place, and general notification given throughout the country to all parties whatever, requesting their prompt attendance for the purpose of ascertaining fairly and properly the sense and choice of a majority of the nation in relation to the subject of their future government; and whereas we, the people of the Cherokee Nation, having assembled under this call, and having heard, read, and interpreted the act of union adopted by the Eastern and Western Cherokees, dated July, 1839, and the constitution framed by a convention composed of members from both parties in pursuance of the provisions of the aforesaid act, and being satisfied with the same, we do hereby approve, ratify, and confirm the said act of union and the constitution, and acknowledge and make known that the government based upon this act and this constitution is the legitimate government of the Cherokee Nation and of our choice, and that it has both our confidence and support.

"Done at Tahlequah, Cherokee Nation, the 16th day January, 1840.

"J. VANN,
"*Assistant Principal Chief.*

"W. SHOREY COODEY,
"*President National Committee.*"

(27 Ct. Cls., 32.)

In January, 1840, General Arbuckle, the military commander at Fort Gibson, in charge of the Cherokee country in Indian Territory, reported to the Secretary of War with regard to the act of union and the constitution above referred to—

"The act of union referred to in one of the accompanying decrees is certainly not entitled to credit, as there were a very small number of the old settlers present who concurred in it, and they acted without authority."

He added:

"This change will no doubt be severely felt by the old settlers generally, who in their kindness invited the late emigrants to enjoy with them the lands they have secured for themselves, and who have in less than one year after their arrival formed a new government for the nation in which the old settlers are not represented by a single individual of their own choice."

And on the 29th January he wrote to the Commissioner of Indian Affairs:

"A meeting was called for both parties to attend, consisting of old settlers and new emigrants, Cherokees, the object being to ascertain
135 which party had the majority. The old settlers did not attend, as they were doubtless well aware that they were in the minority. There were about 700 voters present, who were in favor of the new government; they voted in favor of the constitution and laws of the Ross party." (27 Court of Claims, 33.)

Notwithstanding said act of union and subsequent proceedings there remained much bitter feeling between the Eastern Cherokees and the "Old Settlers," and violent measures were frequently resorted to on both sides to carry out their purposes. These circumstances, among others, led to the making of the treaty of August 6, 1846 (9 Stats. L., 871), wherein it is recited that—

"Serious difficulties have for a considerable time past existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people against the United States;" therefore "with a view to the final and amicable settlement of the difficulties and claims before mentioned" and "to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be" (Western Cherokees v. United States, 27 Ct. Cls., 36, par. 3), it is agreed, among other things, as follows:

"ARTICLE 1. That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835 and in the third section of the act of Congress approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, That such lands shall revert to the United States if the Indians become extinct or abandon the same.

"ART. II. All difficulties and differences heretofore existing between the several parties of the Cherokee Nation are hereby settled and adjusted, and shall, as far as possible, be forgotten and forever buried in oblivion. All party distinctions shall cease, except so far as they may be necessary to carry out this convention or treaty. A general amnesty is hereby declared. All offences and crimes committed by a citizen or citizens of the Cherokee Nation against the nation or against an individual or individuals are hereby pardoned. All Cherokees who are now out of the nation are invited and earnestly requested to return to their homes, where they may live in peace, assured that they shall not be prosecuted for any offence heretofore committed against the Cherokee Nation

or any individual thereof. And this pardon and amnesty shall
136 shall extend to all who may now be out of the nation and who shall return thereto on or before the 1st day of December next. The several parties agree to unite in enforcing the laws against all future offenders. Laws shall be passed for equal protection and for the security of life, liberty, and property; and full authority shall be given by law to all or any portion of the Cherokee people peaceably to assemble and petition their own government or the Government of the United States for the redress of grievances and to discuss their rights. All armed police, light horse, and other military organizations shall be abolished, and the laws enforced by the civil authority alone.

"No one shall be punished for any crime or misdemeanor except on conviction by a jury of his country and the sentence of a court duly authorized by law to take cognizance of the offence. And it is further agreed all fugitives from justice, except those included in the general amnesty herein stipulated, seeking refuge in the territory of the United States, shall be delivered up by the authorities of the United States to the Cherokee Nation for trial and punishment.

"Article III. Whereas certain claims have been allowed by the several boards of commissioners heretofore appointed under the treaty of 1835 for rents, under the name of improvements and spoliations, and for property of which the Indians were dispossessed, provided for under the 16th article of the treaty of 1835; and whereas the said claims have been paid out of the $5,000,000 fund; and whereas said claims were not justly chargeable to that fund, but were to be paid by the United States, the said United States agree to reimburse the said fund the amount thus charged to said fund, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty; and whereas a further amount has been allowed for reservations under the provisions of the 13th article of the treaty of 1835 by said commissioners, and has been paid out of the said fund, and which said sums were properly chargeable to, and should have been paid by, the United States, the said United States further agree to reimburse the amounts thus paid for reservations to said fund; and whereas the expenses of making the treaty of New Echota were also paid out of said fund, when they should have been borne by the United States, the United States agree to reimburse the same and also to reimburse all other sums paid to any agent of the Government and improperly charged to said fund; and the same shall also form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty.

"Art. IV. And whereas it has been decided by the board of commissioners recently appointed by the President of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee Nation in particular, that that portion of the Cherokee people known as the 'Old Settlers' or 'Western Cherokees' had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the

whole nation, including as well that portion then east as that portion then
west of the Mississippi; and whereas the said board of commis-
137 sioners further decided that, inasmuch as the territory before
mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi River, as well as in those occupied by themselves west of that river, which interest should have been provided for in the treaty of 1835, but which was not, except in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be.

"Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, viz: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five millions six hundred thousand dollars (which investments and expenditures are particularly enumerated in the 15th article of the treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would, under such marshalling of accounts, be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one-third part of said residuum, to be distributed per capita to each individual of said party of 'Old Settlers,' or 'Western Cherokees.' It is further agreed that, so far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five million six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the 8th article of the treaty of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted. And, as it affects the settlement with the Western Cherokees, there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund; and it is hereby further understood and agreed that the principle above defined shall embrace all those Cherokees west of the Mississippi who emigrated prior to the treaty of 1835.

"In the consideration of the foregoing stipulation on the part of the United States, the 'Western Cherokees' or 'Old Settlers,' hereby release and quitclaim to the United States all right, title, or claim they may have to a common property in the Cherokee lands east of the Mississippi River, and to exclusive ownership to the lands ceded to them by the treaty of 1833 west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included."

Articles 9, 10, and 11 are as follows:

"ART. 9. The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty and shall
138 embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835, the aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over per capita in equal amounts to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto.

"ART. 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi River had, or may have, under the treaty of 1835 and the supplement thereto.

"ART. 11. Whereas the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the West, of the Eastern Cherokees is not properly chargeable to the treaty fund, it is hereby agreed that that question shall be submitted to the Senate of the United States for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee funds, and if by the Cherokees, then to say whether the subsistence shall be charged at a greater rate than thirty-three 33/100 dollars per head; and also the question, whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum."

XV.

The Senate of the United States, acting as umpire under Article II of the treaty of 1846, on September 5, 1850, passed the following resolution:

"Resolved by the Senate of the United States, That the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury.

"Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the t[illegible]th

day of June, eighteen hundred and thirty-eight, until paid." (Sen. Journal, 31st Cong., 1st sess., p. 602.)

This amount was accordingly appropriated by Congress for that purpose by the act of September 30, 1850, with the proviso that interest be paid on the same at the rate of 5 per cent per annum, according to a resolution of the Senate of the 5th of September, 1850 (9 Stat. L., p. 556). (Finding VII, Cong., 10386.)

139 XVI.

Under the fourth article of the treaty of 1846 the accounting officers of the United States made and prepared for settlement the account therein provided for, whereby it appears that upon crediting the treaty fund therein mentioned as the article prescribes, there would remain a balance of $1,571,346.55, one-third of which distributable to the Western Cherokees, amounting to $523,448.85. Congress, in point of fact, on such account appropriated $532,782.18, and this amount, with interest thereon at 5 per cent from June 12, 1838, was thereupon paid and distributed to the Western Cherokees per capita. The account is as follows:

The fund provided by the treaty of 1835 was taken to be			$5,600,000.00
From which was deducted under the treaty of 1846 (4th article) the sums chargeable under the 15th article of the treaty of 1835, which, according to the report of the accounting officers, stood thus:			
For improvements		$1,540,572.27	
For ferries		159,572.12	
For spoliations		264,894.09	
For removal and subsistence of 18,026 Indians, at $53.334 per head		961,386.66	
Debts and claims upon the Cherokee Nation, viz:			
National debts (10th article)	$18,062.06		
Claims of United States citizens (10th article)	61,073.49		
Cherokee committee (12th article)	22,212.76		
		101,348.31	
Amount allowed United States for additional quantity of land ceded		500,000.00	
Amount invested as a general fund of the nation		500,880.00	
			4,028,653.45
Which, being deducted from the treaty fund of $5,600,000, leaves the residuum contemplated by the 4th article of the treaty of 1846			1,571,346.55
One-third of which balance would be			523,448.85

The balance found by this accounting to be due the Western Cherokees was appropriated for and paid to the individual distributees by and under the provisions of the act of September 30, 1850 (9 Stats., 556).

Under the ninth article of the treaty of 1846 the accounting officers of the United States made and prepared for settlement the account provided for by that article, whereby it appears that after crediting the treaty fund with the cost of subsistence of the Indians at the West, with which it had been charged, there remained a balance due of $914,026.13. Congress accordingly, in addition to the amount of $189,422.76, which had been appropriated for by the act of September 30, 1850 (9 Stats., 556), pursuant to the resolution of the Senate, by the act of February 27, 1851, appropriated the further sum of $724,603.37, and there was thereupon paid and distributed to the Eastern Cherokees per capita the

above amounts, with interest thereon at 5 per cent from June 12, 1838.

140 This account in detail is as follows:

Appropriation, July 2, 1836			$5,000,000.00
Appropriation, July 2, 1836			600,000.00
Appropriation, June 12, 1838			1,047,362.50
Appropriation, February 27, 1851			90,000.00
Appropriation, September 30, 1850			189,151.28
Amounts advanced to individuals and afterwards retained out of appropriation of February 27, 1851			27[illegible]
			6,933,489.78
Disbursements:			
For improvements		$1,540,372.27	
For ferries		150,372.12	
For spoliations		264,894.09	
For removal and subsistence and commutation (herefor, including $2,705.84 expended for goods for the poorer Cherokees, under the fifteenth article of treaty of 1835, as follows:			
Removal, subsistence, and commutation	$2,823,192.93		
Physicians, matrons, medicines, hospitals, stores, etc	32,003.91		
Superintendents, clerks, interpreters, disbursing, issuing, and enrolling agents, conductors, and contingencies	96,989.42		
		2,952,186.26	
For debts and claims upon the Cherokee Nation:			
National debts (tenth article)	18,062.06		
Claims of United States citizens (tenth article)	61,075.49		
Cherokee committee (twelfth article)	22,212.76		
		101,348.31	
For the additional quantity of land ceded to the nation		500,000.00	
For amount invested as the general fund of the nation		500,880.00	
		6,019,463.05	6,019,463.05
			914,026.73

On the 27th of November, 1851, before the payment of any money on account of either of the above-mentioned balances of $523,448.50 and $914,026.13, or the signing of any receipts by the Indians on account thereof, the Cherokee national council made a formal statement of the national claims arising as was contended under the treaties of December 29, 1835, and August 16, 1846, and protested against the above-mentioned settlement accounts with respect to the failure of the accountants to credit therein the treaty fund with the expenses of removal, saying, among other things:

"1st. Because no allowance is made for the sums taken from the treaty fund for removal to the West, although that charge depended on precisely the same words in the treaty of 1835 as did the one year's subsistence, and the Senate unanimously decided on the question submitted to them as arbitrators that the item of subsistence was not a proper charge upon the Cherokee fund. That had been the decision of the Senate about the date of the treaty when that question was specially presented. It was

again so considered by Mr. Poinsett, Secretary of War, in 1838, and his decision was sanctioned by the action of Congress and an appropriation was made for that purpose. But the estimates being too small by half, the Indian fund was then for the first time seized upon.

141 "2d. If it be conceded that the Cherokee fund was liable for these charges, their amount was limited by the eighth article of the treaty to a certain specified amount, and the Government had no right to exceed that amount and charge it to the Indian fund.

"3d. We complain that the alternative of receiving for subsistence $33.33, as provided for in the treaty, was refused to be complied with and the people forced to receive rations in kind at double the cost.

"4th. We complain that the rations issued by the military commandant at Fort Gibson to 'indigent Cherokees' was improperly charged to treaty fund without any legal authority.

"5th. We claim that the United States is bound to reimburse the amount paid to more than 200 or 300 Cherokees who had emigrated to the West prior to 1835, but who were refused a participation in the 'old settler' fund and thrown on the emigrant party who removed after that date.

"6th. We claim that the Cherokees who remained in the States of Georgia, North Carolina, and Tennessee were not entitled to any share in the per capita fund, as they complied with neither of two conditions of their remaining East, both of which were indispensable, and, also, because the census of those Cherokees is, as we believe, enormously exaggerated.

"7th. We complain that the sum of $103,000 has been charged upon the treaty fund for expenses of Cherokees in Georgia three months after they were all assembled and had reported themselves to General Scott as ready to commence the march.

"8th. We claim interest on the balance found due us from the 15th of April, 1851, till paid, Congress having no power to abrogate the stipulations of a treaty.

"9th. We also complain that $20,000 of the fund of the emigrant Cherokees were taken to pay the counsel and agents of the 'Old Settlers' without any authority."

On the 22d day of September, 1851, the western Cherokees had also formulated a separate protest against the proposed settlement with them ("Old Settlers" case, 27 C. Cls., 9).

Both of the foregoing protests were transmitted to and received by the Commissioner of Indian Affairs during the month of April, 1852.

Thereafter said balance of $914,026.13, with interest at 5 per cent from June 12, 1838, was duly paid and distributed to and among the Eastern Cherokees per capita, and the individual Eastern Cherokees executed and delivered to the United States a full and final discharge of all claims and demands whatsoever on the United States, as required by the statute making the appropriations.

This discharge was in the form following:

"We, the undersigned emigrant or Eastern Cherokees, do hereby acknowledge to have received from John Drennan, Superintendent Indian Affairs, the sums opposite our names, respectively, being in full of all demands under the treaty of sixth of August, eighteen hundred and forty-six, according to the principles established in the ninth article thereof,

and appropriated by Congress per act 30th of September, 1850, and per act 27th of February, 1851, which reads as follows:

"And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by treaty to pay to said Cherokee Nation, and except also such money and lands, if any, as the United States may hold in trust for said Cherokees." (Findings VIII, Cong., 10386.)

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And thereafter the said balance of $532,782.18, with interest at 5 per cent from June 12, 1838, was appropriated by Congress, was duly paid and distributed to and among the Western Cherokees per capita, and the individual Western Cherokees executed and delivered to the United States a discharge in the following form:

"We, the undersigned 'old settlers' or Western Cherokees, do hereby acknowledge to have received from John Drennan, Supt. of Indian Affairs, the sums set opposite our names, respectively, being in full of all demands under the provisions of the treaty of the sixth of August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, as per act entitled 'An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, one thousand eight hundred and fifty-one,' approved September 30th, 1850."

The provisions of the appropriation acts referred to in the finding are as follows, viz:

[Act of September 30, 1850 (9 Stats. L., 523, 556).]

"To the 'old settlers' or 'Western Cherokees," in full of all demands under the provisions of the treaty of sixth August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, five hundred and thirty-two thousand eight hundred and ninety-six dollars and ninety cents, and that interest be allowed and paid upon the above sums due respectively to the Cherokees and 'old settlers,' in pursuance of the above-mentioned award of the Senate, under the reference contained in the said eleventh article of the treaty of sixth August, eighteen hundred and forty-six: Provided, That in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due: Provided also, That the Indians who shall receive the said money shall first respectively sign a receipt or release, acknowledging the same to be in full of all demands under the fourth article of said treaty."

[Act of February 27, 1851 (9 Stat. L., 570, 572).]

"For payment to the Cherokee Nation the sum of seven hundred and twenty-four thousand six hundred and three dollars and thirty-seven cents, and interest on the above sum at the rate of five per centum per annum, from twelfth day of June, eighteen hundred and thirty-eight, until paid, shall be paid to them out of any money in the Treasury

not otherwise appropriated; but no interest shall be paid after the first
of April, eighteen hundred and fifty-one, if any portion of the
143 money is then left undrawn by the said Cherokees: Provided,
however, that the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation, and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees: And provided further, that the money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of sixth August, eighteen hundred and forty-six."

No portion of either of said balances was paid to the Cherokee Nation or its citizens, otherwise than as above set forth, and no receipt or discharge other than as above described passed to the United States on account of such payments.

XVII.

By act of Congress of February 29, 1889 (25 Stats., 694), it was provided—

"That the claim of that part of the Cherokee Indians known as the Old Settlers or Western Cherokees against the United States, which claim was set forth in the report of the Secretary of the Interior to Congress of February third, eighteen hundred and eighty-three (said report being made under act of Congress of August seventh, eighteen hundred and eighty-two), and contained in Executive Document Number Sixty of the the second session of the Forty-seventh Congress, be, and the same hereby is, referred to the Court of Claims for adjudication; and jurisdiction is hereby conferred on said court to try said cause and to determine what sum or sums of money, if any, are justly due from the United States to said Indians, arising from or growing out of treaty stipulations and acts of Congress relating thereto, after deducting all payments heretofore actually made to said Indians by the United States, either in money or property; and after deducting all offsets, counterclaims, and deductions of any and every kind and character which should be allowed to the United States under any valid provision or provisions in said treaties and laws contained, or to which the United States may be otherwise entitled."

Under this act suit was instituted in the Court of Claims on behalf of the "Old Settlers," and resulted in a judgment against the United States for $224,972.68, "being a balance of the per capita fund provided by the fourth article of the treaty between the United States and the Western Cherokees, dated August 6, 1846, together with interest thereon from the 12th day of June, 1838, up to and until the entry of this decree, being the sum of $603,145.58, and likewise the sum of $4,179.26 for 3,343.41/100 acres of land in Arkansas ceded to the United States by article 4 of the treaty of May 6, 1828, amounting in the aggregate to the sum of $832,297.52." (27 Ct. of Cls., 1, 20, 56.)

On appeal to the Supreme Court of the United States this judg-
144 ment, on April 3, 1893, was modified as per the account stated by that court as follows:

The treaty fund		$5,600,000.00
Less:		
For 800,000 acres of land	$500,000.00	
For general fund	500,000.00	
For improvements	1,540,572.27	
For ferries	159,572.12	
For spoliations	264,894.09	
For debts, etc	60,000.00	
For removal of 16,967 Cherokees, at $20 each	339,140.00	
		3,364,178.48
Giving as the residuum to be divided		2,235,821.52
One-third due the Western Cherokees		745,273.84
Less payment September 22, 1851		532,896.90
Leaving a balance of		212,376.94

To which amount the court added the further sum of $4,179.26 for the Arkansas agency, and as so modified was affirmed, with interest on said balance of $212,376.94 at the rate of 5 per cent from June 12, 1838, up to and until the modification of the decree.

August 23, 1894, Congress appropriated the sum of $800,386.31 in settlement of this judgment, and of such amount the sum of $745,273.84 was distributed to the Western Cherokee as identified by the Drennen roll of 1852, if living, and to the descendants of those who had died. According to said roll the "Western Cherokee" then numbered 3,146 persons, who accordingly received the sum of $236.89 per capita, excluding interest.

XVIII.

By section 14 of the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1889, and for other purposes," approved March 2, 1889 (25 Stats. L., 1005), the President was authorized to appoint three commissioners to negotiate with the Indian tribes owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and he did appoint David H. Jerome, Alfred M. Wilson, and Warren G. Sayre such commissioners.

By virtue of the authority contained in an act of the Cherokee national council, approved November 16, 1891, Elias C. Boudinot, Joseph A. Scales, Roach Young, William Triplett, Thomas Smith, Joseph Smallwood, and George Downing were duly appointed commissioners—

"To meet and enter into negotiations with the above-named commission, appointed by the President of the United States, for the cession of the lands of the Cherokee Nation west of the 96th degree of west longitude, and for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled."

145 By said act of Congress it was made the duty of said commissioners appointed by the President to report all agreements resulting from such negotiations to the President, to be by him reported

to the Congress at its next session, and by the act of the Cherokee council it was made the duty of the commissioners on the part of the Cherokee Nation to report all their proceedings in full to the national council for its approval and ratification. (Ex. Doc. 56, 52d Cong., 1st sess., 17.)

At the outset of the negotiations between said commissioners for the purchase and sale of said lands, which were known as the "Cherokee Outlet," the commissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as "a condition precedent to any agreement for the sale of the land" that some adjustment of such contentions should be made.

On the 19th of December, 1891, after prolonged negotiations, the commissioners above named entered into articles of agreement, by Article I of which it was agreed that—

"The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth (100°) degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth (96°) degree west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by Executive order, dated August 10, 1860, the tract of land embraced within the above boundaries containing eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less."

By article 2 that—

"For and in consideration of the above cession and relinquishment the United States agrees:"

First. That it will remove from the limits of the Cherokee Nation as trespassers certain described persons.

Second. That a certain article of the antecedent treaty of July, 1866, should be abrogated and held for naught.

Third. That the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction in certain cases.

Fourth. That—

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right,
146 within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted

in, said accounting; and the Congress of the United States shall, at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting."

Fifth. That certain citizens of the Cherokee Nation should have the right to select lands as homesteads under certain conditions; and

Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States shall pay to the Cherokee Nation, at such times and in such manner as the Cherokee national council shall determine, the sum of $8,595,736.12 in excess of the sum of $728,389.46, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River.

Said articles of agreement were accepted, ratified, and confirmed on the part of the Cherokee Nation by an act of the national council approved January 4, 1892, and were also accepted, ratified, and confirmed on the part of the United States by act of Congress of March 3, 1893 (27 Stat. L., 640).

Prior to the acceptance and ratification of said agreement on the part of the United States, as aforesaid, the commissioners on behalf of the United States, as required by the law under which they were appointed, had reported to the President the making of the articles of agreement aforesaid, and by way of explanation said:

"As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

"The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

"Whatever that construction is, the Indian must abide by [it]. There is no appeal except to Congress. Without going specifically into details the Cherokees claim that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them. They also desire to include lands as well as money, but they were induced to eliminate 'lands' from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has con-
147 strued the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected." (Sen. Ex. Doc. 56, 52d Cong., 1st sess., pp. 11, 12.)

Gen. Thomas J. Morgan, Commissioner of Indian Affairs, in his report to the Secretary of the Interior on February 6, 1892, made the following explanation and comment on the fourth section of article 2, to wit:

"The fourth section of article 2 provides for an accounting between the United States and the Cherokee Nation. The work necessary to render this account will be very heavy, and much time will be necessary to properly prepare the same. On this provision of the agreement the commissioners say:

"The Government has made the accounting, has kept the books, has construed the treaties. If this has been done properly no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for legal discharge of the old ones.

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it.

"In your reference of the matter to this office you said:

"'Particular attention is called to section 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions.'

"In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation, under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this office within a reasonable time, say, about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement herewith inclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose." (Senate Ex. Doc. No. 56, 52d Cong., 1st sess., p. 8.)

This report of the Commissioners was, on or about February 8, 1892, referred by the Secretary of the Interior to the Assistant Attorney-General for the Interior Department "for his consideration and report upon the legality of the contract, the sufficiency of the proposed bill, and his views upon the question(s) of law relating to the subject," and on or about February 25, 1892, said officer reported thereon, as appears
148 in said Senate Executive Document 56, Fifty-second Congress, first session, saying, among other things:

"The report and agreement were referred to the Commissioner of Indian Affairs, who, under date of February 6, 1892, reported favorably on the agreement, and transmitted with his report the draft of a bill to be submitted to Congress to ratify and carry out the provisions thereof. * * * The agreement contains two articles. The first relates to the cession and the second to the consideration therefor. * * *

"The considerations for said cession, as contained in article 2, are set forth under six subdivisions. * * *

"The fourth and next provision of article 2 of the agreement requires the United States to render to the Cherokee Nation a complete accounting of all money agreed to be paid to the Indians or which they may be entitled to under any treaty or act of Congress since 1817. And if said accounting is satisfactory Congress shall make the necessary appropriation to pay the same. But if the accounting is not satisfactory, then the Cherokees to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

"I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting.

"The Commissioner of Indian Affairs asks for a special appropriation of $5,000 to enable him to make the accounting."

All of these reports were before the Congress when it accepted and ratified said articles of agreement by act of March 3, 1893 (27 Stat. L., 641), in the following language, to wit:

"Which said agreement is fully set forth in the message of the President of the United States, communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the 'Cherokee Outlet;' and said agreement is hereby ratified by the Congress of the United States, subject, however, to the Constitution and laws of the United States and to acts of Congress that have been or may be passed regulating trade and intercourse with the Indians, and subject also to certain amendments thereto, as follows: * * * (Amendments not important here.) * * *."

"And the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States; provided that the money hereby appropriated shall be immediately available, and the remaining sum of eight million three hundred thousand dollars, or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal instalments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of
149 four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated;"

* * * * * * *

"The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement, as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands;"

* * * * * * *

"And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become, and be taken to be and treated as a part of the public domain."

XIX.

By said act of March 3, 1893, ratifying said agreement for the purchase of the "Cherokee Outlet" the Congress also provided as follows:

"The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement."

Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was by the Secretary of the Interior referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted was accepted by the Cherokee Nation by an act of its national council approved December 1, 1894, and no suit was thereafter brought by the Cherokee Nation against the United States charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its national council above referred to, did notify the Secretary of the Interior of the acceptance by said nation of said account as so stated by Messrs. Slade and Bender, and did request said Secretary of the Interior to notify the Congress of the United States of such acceptance, and on the 7th of January, 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

"SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement
150 made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stats., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of Cherokee national council accepting such accounting.

"The Speaker of the House of Representatives." (House Ex. Doc. No. 182, 53d Cong., 3d sess.)

XX.

The report and accounting made by said James A. Slade and Joseph T. Bender, referred to in the foregoing finding, is in the words and figures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

"The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement [a number of demands made by the Cherokee Nation were disallowed], and the result of the finding is submitted in the following schedule:

"Under the treaty of 1819:	
"Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'school' fund.....	$2,125.00
"(With interest from February 27, 1819, to date of payment.)	
"Under treaty of 1835:	
"Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund.....	1,111,284.70
"(With interest from June 12, 1838, to date of payment.)	
"Under treaty of 1866:	
"Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation.....	432.28
"(With interest from January 1, 1874, to date of payment.)	
"Under act of Congress, March 3, 1893:	
"Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund.....	20,406.25
"(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)"	

"Washington, D. C., April 28, 1894.

"(Signed) JAS. A. SLADE.
"JOS. T. BENDER."

XXI.

In arriving at the item of $1,111,284.70 the accountants among other tabulations made the following statement of the account:

"Figuring upon the basis stated in the ninth article of the treaty of 1846, and following the Auditor's and Comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067 the excess of payments over the amounts appropriated by the United States for that purpose, the true statement of the account is as follows:

151	For improvements.....		$1,540,572.27
	For ferries.....		159,572.12
For spoliations.....			264,894.09
For removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items.....		$335,105.91 1,047,067.00	1,382,172.91
For debts and claims upon the Cherokee Nation.....			101,348.31
For the additional quantity of land ceded to the nation.....			500,000.00
For amount invested as the general fund of the nation.....			500,880.00
For subsistence furnished after expiration of one year, under agreement that it should be charged to treaty fund.....			172,316.47
			4,621,756.17
For lands and possessions.....			5,000,000.00
For spoliations.....			264,894.09

Balance of $600,000 applicable to removal	$335,105.91
Appropriation of June 12, 1838	1,047,067.00
	6,647,067.00
From which deduct charges as above	4,621,756.17
Balance to be distributed per capita	2,025,310.83
Deduct amount actually distributed as already explained	914,026.13
Balance due	1,111,284.70

The sum of $914,026.13, actually distributed to the Eastern Cherokees in 1852, out of the above balance of $2,025,310.83, was appropriated as follows:

Amount found due by Treasury officials, under article 9, 1846, in the report of the Auditor and Comptroller of December 3, 1849	$627,603.95
Erroneous charge corrected by act of February 27, 1851	96,999.42
Erroneous charge account subsistence, corrected by Congress, September 30, 1850	189,151.24
	914,026.13

This amount of $914,026.13 was distributed solely to 14,098 Eastern Cherokees in the West and 2,133 Eastern Cherokees who remained East.

Interest on the above sum of $914,026.13 at 5 per cent from June 12, 1838, was also appropriated by Congress and distributed per capita to said Eastern Cherokees in the same payment. The balance to be distributed per capita according to the above report and which was not distributed, to wit, $1,111,284.70, is the sum of which the Eastern Cherokees complain they were deprived in the settlement of 1852; that while they received only $56.31 per capita, excluding interest, they should have received the further sum of $1,111,284.70, or a total of $2,025,310.83, as appears in the above account rendered as the true balance under article 9, making them a total per capita of $124.78.

The settlement made with the Old Settlers was as set forth in Finding XVIII.

XXII.

Neither the whole nor any portion of the various sums with interest found and stated by the concluding schedule of the so-called Slade-Bender report to be due to the Cherokee Nation under the treaties and acts of Congress therein referred to have been paid to the Cherokee Nation, or to any officer, agent, or other person acting in its behalf.

With the exception of the provision contained in the act of March 2, 1895, making appropriations for the legislative, executive, and
152 judicial expenses of the Government, directing the Attorney-General to review and report upon the conclusion of law disclosed in the account of Slade and Bender, and the passing of the provisions of the acts of July 1, 1902, and March 3, 1903, conferring jurisdiction upon the United States Court of Claims to hear and determine these causes, the Congress has taken no action whatever with respect to the said account of Slade and Bender or the amounts found due thereunder.

Acting under said direction of March 2, 1895, above referred to, the Attorney-General of the United States, on December 2, 1895, addressed a communication to the Congress wherein he advised that body of his disagreement with the conclusions reached by said Slade and Bender.

Said communication of the Attorney-General was, on December 2, 1895, by the Congress referred to the Committee on Indian Affairs and ordered to be printed, and the same appears in Senate Executive Document No. 16, Fifty-fourth Congress, first session.

XXIII.

The total acreage ceded by the Cherokee people to the United States at various times, as appears from Royce's History of the Cherokees (see Report of Ethnological Bureau, 1884), is as follows:

Date of treaty.	State where ceded lands are located.	Area in square miles.	Area in acres.
1721	South Carolina	2,623	1,678,720
November 24, 1755	do	8,635	5,526,400
October 14, 1768	Virginia	850	544,000
October 18, 1770	do	4,500	2,880,000
	West Virginia	4,300	2,752,000
	Tennessee	150	96,000
	Kentucky	250	160,000
1772	do	10,125	6,480,000
	West Virginia	437	279,680
	Virginia	345	220,800
June 1, 1773	Georgia	1,050	672,000
March 17, 1775	Kentucky	22,600	14,464,000
	Virginia	1,800	1,152,000
	Tennessee	2,650	1,696,000
May 20, 1777	South Carolina	2,051	1,312,640
July 20, 1777	North Carolina	4,414	2,824,960
	Tennessee	1,760	1,126,400
May 31, 1783	Georgia	1,650	1,056,000
November 28, 1785	North Carolina	500	352,000
	Tennessee	4,914	3,144,960
	Kentucky	917	586,880
July 2, 1791	Tennessee	3,435	2,198,400
	North Carolina	722	462,080
October 2, 1798	Tennessee	952	609,280
	North Carolina	587	375,680
October 24, 1804	Georgia	135	86,400
October 25, 1805	Kentucky	1,086	695,040
	Tennessee	7,032	4,500,480
October 27, 1805	Tennessee	1¼	80
January 7, 1806	do	5,269	3,372,160
	Alabama	1,602	1,025,280
March 22, 1816	South Carolina	148	94,720
September 14, 1816	Alabama	3,429	21,194,560
	Mississippi	4	2,560
July 8, 1817	Georgia	583	373,120
	Tennessee	435	278,400
February 27, 1819	Georgia	837	535,680
	Alabama	1,154	738,560
	Tennessee	2,408	1,541,120
	North Carolina	1,542	986,880
May 6, 1828	Arkansas	4,720	2,020,800
December 29, 1835	Tennessee	1,484	949,760
	Georgia	7,202	4,609,280
	Alabama	2,518	1,611,520
	North Carolina	1,112	711,680
July 19, 1866a	Kansas	1,928	1,233,920
Total		126,906	81,220,374

(H. R. Mis. Doc. 157, 49th Cong., 2d sess., vol. 10, p. 378.)

153 CONCLUSIONS OF LAW.

Upon the foregoing facts the court concludes as matters of law:

First that the United States is indebted to the Cherokee Nation in the following amounts, viz:

(1) The sum of $2,125, with interest at 5 per cent from February 27, 1819, to date of payment;

(2) The sum of $1,111,284.70, with interest at 5 per cent from June 12, 1838, to date of payment;

(3) The sum of $432.28, with interest at 5 per cent from January 1, 1874, to date of payment;

(4) The sum of $20,406.25, with interest at 5 per cent from July 1, 1893, to date of payment,

and is entitled to have judgment entered in its favor against the United States therefor.

Second. The proceeds of so much of said judgment as pertains to the items numbered 1, 3, and 4 equitably belong to the Cherokee Nation as a political or social body, and such proceeds, less any proportion thereof which the Cherokee Nation may have contracted to pay on account of counsel fees and other expenses of this litigation, should be paid or disposed of as follows, viz:

(*a*) The amount represented by item numbered three (3) for $432.28, and interest, should be paid to the treasurer of the Cherokee Nation, or to such other person or officer either of the nation or of the United States as may hereafter succeed to his duties;

(*b*) The amount represented by item numbered one (1), for $2,125 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the principal of the "Cherokee school fund," of which fund the United States are trustees;

(*c*) The amount represented by item numbered four (4), for $20,406.25 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the "Cherokee national fund," of which fund the United States are trustees;

(*d*) The amount represented by item numbered two (2), for $1,111,284.70 and interest, less counsel fees and expenses, equitably belongs to the Eastern and Western Cherokees who were parties either to the treaty of New Echota, proclaimed May 23, 1836, or the treaty of Washington, of August 6, 1846, as individuals, whether east or west of the Mississippi River, and should be paid to them or to their legal representatives by the Secretary of the Interior.

Third. Such counsel fees as may have been contracted to be paid by the Cherokee Nation in the manner prescribed by sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and such other counsel fees and expenses as may be allowed by this court pursuant to the provisions of the act of March 3, 1903, set forth in Finding of Fact No. 1, should be paid to the parties entitled to receive the same by the Secretary of the Treasury upon the making of an appropriation by Congress for the payment of the judgment in this cause.

Fourth. The cost and expenses incident to ascertaining and identifying the individuals entitled to participate in the distribution of the bal-

ance of the amount represented by item numbered two (2), and the making of the distribution thereof, should be a charge upon such balance for distribution and should be deducted therefrom.

BY THE COURT.

154

THE CHEROKEE NATION
v.
THE UNITED STATES. } No. 23199.

THE EASTERN CHEROKEES
v.
THE UNITED STATES AND THE CHEROKEE NATION. } No. 23214.

THE EASTERN AND EMIGRANT CHEROKEES
v.
THE UNITED STATES. } No. 23212.

XIV.—Judgment entered May 18, 1905.

The above causes, on motion and by consent of the parties, having heretofore been consolidated for purposes both of hearing and judgment by appropriate order of this court, came on to be heard upon the pleadings, orders, and proofs, and were argued by Messrs. Charles Nagel, Edgar Smith, and Frederic D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson, on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood, on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney-General Pradt, on behalf of the United States; and the court being now sufficiently advised in the premises, it is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of $2,125.00
With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.

Item 2. The sum of 1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

Item 3. The sum of 432.20
With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.

Item 4. The sum of 20,406.25
With interest thereon from July 1, 1903, to date of payment.

155 the proceeds of said several items, however, to be paid and distributed as follows:

The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation, and shall be credited on the proper books of account to the principal of the "Cherokee school fund" now in the possession of the United States and held by them as trustees.

The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation, to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the "Cherokee national fund," now in the possession of the United States and held by them as trustees.

The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same, upon the making of an appropriation by Congress to pay this judgment.

The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States.

BY THE COURT.

156 *XV.—Application of the United States, defendants, for and allowance of an appeal.*

THE CHEROKEE NATION vs. THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN AND EMIGRANT CHEROKEES vs. THE UNITED STATES AND THE CHEROKEE Nation.	No. 23212.	
THE EASTERN CHEROKEES vs. THE UNITED STATES AND THE CHEROKEE Nation.	No. 23214.	

From the judgment rendered in the above-entitled cause on the 18th day of May, 1905, in favor of claimant, The Cherokee Nation, the defendants, by their Attorney-General, on the 8th day of June, 1905, make application for, and give notice of, an appeal to the Supreme Court of the United States, and the said defendants pray that the said appeal be now allowed.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed June 8, 1905.

Indorsed: "The appeal of the defendants in this case is allowed.

"CHARLES C. NOTT, *Chief Justice.*"

June 10, 1905.

157 *XVI.—Application of the Eastern Cherokees for and allowance of an appeal.*

THE CHEROKEE NATION v. THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN AND EMIGRANT CHEROKEES v. THE UNITED STATES AND THE CHEROKEE Nation.	No. 23212.	
THE EASTERN CHEROKEES v. THE UNITED STATES AND THE CHEROKEE Nation.	No. 23214.	

From the judgment rendered in the above-entitled cause on the 18th day of May, 1905, in favor of the Cherokee Nation, the Eastern Cherokees, by their attorneys, on the 9th day of June, 1905, make application

for, and give notice of, an appeal to the Supreme Court of the United States and pray that the said appeal be now allowed.

ROBERT L. OWEN.
ROBERT V. BELT.

Filed June 12, 1905.

The appeal of the Eastern Cherokees from the judgment in this case is allowed.

CHARLES C. NOTT, *Chief Justice.*

June 13, 1905.

158 *XVII.—Application of the Cherokee Nation, claimant, for and allowance of an appeal.*

THE CHEROKEE NATION v. THE UNITED STATES.	No. 23199.	Consolidated.
THE EASTERN CHEROKEES v. THE UNITED STATES.	No. 23214.	
THE EASTERN AND EMIGRANT CHEROKEES v. THE UNITED STATES.	No. 23212.	

Now comes the Cherokee Nation, claimant, by its attorneys of record, Finkelnburg, Nagel & Kirby and Edgar Smith, and pray an appeal to the Supreme Court of the United States from so much of the judgment entered in the above consolidated causes on May 18, 1905, as provides that the sum of $1,111,284.70, with interest thereon from June 12, 1836, to date of payment, less certain counsel fees and expenses, shall be paid to the Secretary of the Interior to be by him distributed in accordance with the further terms of said judgment.

FINKELNBURG, NAGEL AND KIRBY,
EDGAR SMITH,
Attorneys for the Cherokee Nation.

Filed July 3, 1905.

Order: "Let the above appeal of the Cherokee Nation be allowed.

"CHARLES C. NOTT,
"*Chief Justice.*"

July 3, 1905.

159 COURT OF CLAIMS.

THE CHEROKEE NATION *vs.* UNITED STATES.	23199.	Consolidated.
THE EASTERN CHEROKEES *vs.* UNITED STATES.	23214.	
THE EASTERN AND EMIGRANT CHEROKEES *vs.* UNITED STATES.	23212.	

I, John Randolph, Assistant Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above consolidated cases—of the opinion of the court and of the concurring and dissenting opinions, of the findings of fact and conclusions of law filed by the court, of the judgment of the court, of the respective applications of the defendants and claimants for appeal to the Supreme of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 13th day of July, 1905.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

160 (Indorsement on cover:) Court of Claims. File No., 19848. Term No., 346. The United States, appellant, vs. The Cherokee Nation. File No., 19849. Term No., 347. The Eastern Cherokees, appellants, vs. The Cherokee Nation. File No., 19850. Term No., 348. The Cherokee Nation, appellant, vs. The United States. Filed July 19th, 1905. File Nos., 19848, 19849, 19850. Office of the clerk, Supreme Court U. S. Received July 17, 1905.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 346.
THE UNITED STATES, APPELLANT,
vs.
THE CHEROKEE NATION.

No. 347.
THE EASTERN CHEROKEES, APPELLANTS,
vs.
THE CHEROKEE NATION.

No. 348.
THE CHEROKEE NATION, APPELLANT,
vs.
THE UNITED STATES.

We, the undersigned, attorneys in the above-entitled causes, agree that the attached intervening petition in suit No. 23199, of date December 22, 1903, may be filed in this appeal to complete the record.

L. A. PRADT,
Assistant Attorney-General.
F. D. MCKENNEY,
Atty. for Cherokee Nation.
ROBT. L. OWEN,
R. V. BELT,
W. H. ROBESON,
Attys. for the Eastern Cherokees.

In the United States Court of Claims.

THE CHEROKEE NATION, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT.
} No. 23199, genl. dock. 32.

Motion and petition to intervene and to consolidate suits Nos. 23199, 23212, and 23214.

Your petitioners, composed of about 4,500 Eastern and Emigrant Cherokees, more or less, pray this honorable court for leave to intervene in the above-entitled cause for the following reasons:

1. They are interested in the subject-matter of this suit and believe themselves to be entitled in proportion to their numbers to one-fifth or

more of the the $1,111,284.70 asked for, with interest thereon at 5% from June 12, 1838, the whole of which is being claimed by the plaintiff in the above cause.

2. Your petitioners filed in this court March 10, 1903, an independent suit, No. 23212, general docket, asking for this one-fifth interest, in which they would much prefer to be heard, but they did so without taking cognizance of the fact that the Cherokee Nation, so called, had already filed in this court, to wit, February 20, 1903, under act of July 1, 1902, the above-entitled suit which now, by reason of its date of filing, has precedence on the docket and may be taken up and considered to the detriment of your petitioners before their cause No. 23212 is reached, beside raising the question, to which they would not be able to
3 respond, of their right to file a suit at all, if, as they claim, the Cherokee Nation only named in "The agreement" has a right to bring suit; or if your petitioners are not an organized tribe or band within the contemplation of the act under which they have filed.

3. The Cherokee Nation, as such, has never recognized in the distribution of its lands, or funds, the Eastern Band of Cherokee Indians of North Carolina, so called (now only a corporation), and much less any of the Cherokees who have segregated themselves from said band either in said State or the adjoining States, many of whom are numbered among your petitioners, and many of whom have gone west to the Indian Territory, and have remained there for years and have failed to get recognition as citizens of the nation, often on account of jealousy of the number of allottees claiming enrollment, although the proofs of their Cherokee blood was duly filed with the "Commission."

4. Besides this, there was filed in this honorable court on March 14, 1903, a third suit, No. 23214, general docket, asking for the same fund, by The Eastern Cherokees vs. The United States and the Cherokee Nation, claiming under act of March 3, 1903, but representing only in part your petitioners, who, having failed to get their allotments, or any portion of the money distributed from the sale of the Cherokee strip, do not now wish to lose their share or pro rata of the second item of "the award" of money improperly taken from the five million fund, a fund created by the sale of their ancestral homes; whose parents were parties to the treaty of New Echota, and whose names are on the roll of 1835.

5. There are now, as stated, three suits filed in this honorable court, all claiming the same subject-matter, and the act of March 3, 1903, indicates that all suits of this nature shall be consolidated and tried
4 together, but this suit, No. 23199, was filed before this legislation was enacted, and the petitioners are not, therefore, bound by it, as the legislation is not retroactive, and they may not choose to be controlled by it.

Prayer.

Wherefore your petitioners pray not only that they may be allowed to intervene in suit No. 23199, in order to be insured a hearing, and that their rights may be protected, but that the three suits, Nos. 23199, 23212, and 23214, general docket, may be consolidated, so that their proofs and arguments already filed in No. 23212 may become available, and the rights of Eastern Cherokees as represented in suit No. 23214, not fully

comprehended in the other suits, may also be considered, and a joint hearing had of all the parties in interest.

Requests for findings of fact and briefs have been duly filed in the three suits.

BELVA A. LOCKWOOD,
Attorney for Eastern and Emigrant Cherokees.

5 CITY OF WASHINGTON, *District of Columbia, ss:*

Personally appeared before the undersigned, a notary public in and for the District of Columbia, Belva A. Lockwood, whose genuine signature is subscribed to the above petition, who, being sworn in due form of law, deposes and says: "I have read the above petition by me subscribed and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated on information and belief I believe to be true; and that I have authority under seal to sign the names of and to represent in this cause each and every one of the petitioners sought to be represented herein."

BELVA A. LOCKWOOD,
Attorney for Eastern and Emigrant Cherokees.

Sworn and subscribed before me, this 22d day of December, 1903.

[SEAL.] JAY G. WILSON,
Notary Public.

Filed Dec. 22, 1903.

A true copy of the original filed in the Court of Claims in case numbered 23199, on the 22d day of December, 1903.

Test this 20th day of October, A. D. 1905.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed:) File Nos. 19848, &c. Supreme Court U. S. October term, 1905. Term Nos., 346, 347, and 348. The United States, appellant, v. The Cherokee Nation; The Eastern Cherokees, appellant, v. The Cherokee Nation; The Cherokee Nation, appellant, v. The United States. Stipulation of counsel and addition to record. Filed Nov. 10th, 1905.

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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT, *v.* THE CHEROKEE NATION. } No. 346.

THE EASTERN CHEROKEES, APPELLANT, *v.* THE CHEROKEE NATION. } No. 347.

THE CHEROKEE NATION, APPELLANT, *v.* THE UNITED STATES. } No. 348.

MOTION TO ADVANCE.

Now comes the Solicitor-General, on behalf of the United States, and moves the court to advance the above-entitled causes on the docket and assign the same for argument at an early day convenient to the court.

The controversy between the United States and the Cherokee Indians involved in these causes which arises under various treaties has been actively waged by the Indians for many years past. It relates principally to amounts paid for the removal of Eastern Cherokees to the Indian Territory, improperly charged to the treaty fund, and to interest on Choctaw funds improperly charged to the Cherokee national

funds. It has demanded and received much attention both of Congress and of the Department of the Interior, and in one phase or another has provoked much litigation in the Federal courts. With a view of putting an end to the controversy Congress, by an act approved July 1, 1902 (32 Stat. L., 716), conferred jurisdiction upon the Court of Claims to consider and adjudicate the matter with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the former court, further providing in said act "that any such suit shall on motion of either party be advanced on the docket of either of said courts and be determined at the earliest practicable time."

By section 63 of the act of Congress of July 1, 1902 (32 Stats., 716, 725), it is provided that—

> The tribal government of the Cherokee Nation shall not continue longer than March 4, 1906.

As the Cherokee Nation in its tribal capacity is a party to this cause, it is deemed desirable in furtherance of the evident intent of Congress as expressed above that this litigation should be settled before the last-mentioned date, if possible.

Judgment was rendered in the Court of Claims in favor of the claimant, the Cherokee Nation, and against the United States in a sum of money calculated to be in excess of $4,000,000. Upon the principal item of the claim, which was for the sum of $1,111,284.70, the judgment of the Court of Claims

allowed interest at the rate of 5 per cent per annum, amounting at the date of the judgment to more than $3,000,000, and under the judgment interest continues to run at the specified rate.

For the purpose of determining the litigation, of obtaining a speedy disposition of the matter, and of putting an end to the ever increasing interest obligation on this large amount, it is respectfully prayed that this motion to advance be granted.

All parties to the above causes concur in this motion.

HENRY M. HOYT,
Solicitor-General.

○

1 SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 346.
THE UNITED STATES, APPELLANT,
vs.
THE CHEROKEE NATION.

No. 347.
THE EASTERN CHEROKEES, APPELLANTS,
vs.
THE CHEROKEE NATION.

No. 348.
THE CHEROKEE NATION, APPELLANT,
vs.
THE UNITED STATES.

We, the undersigned, attorneys in the above-entitled causes, agree that the attached intervening petition in suit No. 23199, of date December 22, 1903, may be filed in this appeal to complete the record.

L. A. PRADT,
Assistant Attorney-General.
F. D. MCKENNEY,
Atty. for Cherokee Nation.
ROBT. L. OWEN,
R. V. BELT,
W. H. ROBESON,
Attys. for the Eastern Cherokees.

2 In the United States Court of Claims.

THE CHEROKEE NATION, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT.
} No. 23199, genl. dock. 32.

Motion and petition to intervene and to consolidate suits Nos. 23199, 23212, and 23214.

Your petitioners, composed of about 4,500 Eastern and Emigrant Cherokees, more or less, pray this honorable court for leave to intervene in the above-entitled cause for the following reasons:

1. They are interested in the subject-matter of this suit and believe themselves to be entitled in proportion to their numbers to one-fifth or

more of the the $1,111,284.70 asked for, with interest thereon at 5% from June 12, 1838, the whole of which is being claimed by the plaintiff in the above cause.

2. Your petitioners filed in this court March 10, 1903, an independent suit, No. 23212, general docket, asking for this one-fifth interest, in which they would much prefer to be heard, but they did so without taking cognizance of the fact that the Cherokee Nation, so called, had already filed in this court, to wit, February 20, 1903, under act of July 1, 1902, the above-entitled suit which now, by reason of its date of filing, has precedence on the docket and may be taken up and considered to the detriment of your petitioners before their cause No. 23212 is reached, beside raising the question, to which they would not be able to
3 respond, of their right to file a suit at all, if, as they claim, the Cherokee Nation only named in "The agreement" has a right to bring suit; or if your petitioners are not an organized tribe or band within the contemplation of the act under which they have filed.

3. The Cherokee Nation, as such, has never recognized in the distribution of its lands, or funds, the Eastern Band of Cherokee Indians of North Carolina, so called (now only a corporation), and much less any of the Cherokees who have segregated themselves from said band either in said State or the adjoining States, many of whom are numbered among your petitioners, and many of whom have gone west to the Indian Territory, and have remained there for years and have failed to get recognition as citizens of the nation, often on account of jealousy of the number of allottees claiming enrollment, although the proofs of their Cherokee blood was duly filed with the "Commission."

4. Besides this, there was filed in this honorable court on March 14, 1903, a third suit, No. 23214, general docket, asking for the same fund, by The Eastern Cherokees vs. The United States and the Cherokee Nation, claiming under act of March 3, 1903, but representing only in part your petitioners, who, having failed to get their allotments, or any portion of the money distributed from the sale of the Cherokee strip, do not now wish to lose their share or pro rata of the second item of "the award" of money improperly taken from the five million fund, a fund created by the sale of their ancestral homes; whose parents were parties to the treaty of New Echota, and whose names are on the roll of 1835.

5. There are now, as stated, three suits filed in this honorable court, all claiming the same subject-matter, and the act of March 3, 1903, indicates that all suits of this nature shall be consolidated and tried
4 together, but this suit, No. 23199, was filed before this legislation was enacted, and the petitioners are not, therefore, bound by it, as the legislation is not retroactive, and they may not choose to be controlled by it.

Prayer.

Wherefore your petitioners pray not only that they may be allowed to intervene in suit No. 23199, in order to be insured a hearing, and that their rights may be protected, but that the three suits, Nos. 23199, 23212, and 23214, general docket, may be consolidated, so that their proofs and arguments already filed in No. 23212 may become available, and the rights of Eastern Cherokees as represented in suit No. 23214, not fully

comprehended in the other suits, may also be considered, and a joint hearing had of all the parties in interest.

Requests for findings of fact and briefs have been duly filed in the three suits.

BELVA A. LOCKWOOD,
Attorney for Eastern and Emigrant Cherokees.

5 CITY OF WASHINGTON, *District of Columbia, ss:*

Personally appeared before the undersigned, a notary public in and for the District of Columbia, Belva A. Lockwood, whose genuine signature is subscribed to the above petition, who, being sworn in due form of law, deposes and says: "I have read the above petition by me subscribed and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated on information and belief I believe to be true; and that I have authority under seal to sign the names of and to represent in this cause each and every one of the petitioners sought to be represented herein."

BELVA A. LOCKWOOD,
Attorney for Eastern and Emigrant Cherokees.

Sworn and subscribed before me, this 22d day of December, 1903.

[SEAL.] JAY G. WILSON,
Notary Public.

Filed Dec. 22, 1903.

A true copy of the original filed in the Court of Claims in case numbered 23199, on the 22d day of December, 1903.

Test this 20th day of October, A. D. 1905.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed:) File Nos. 19848, &c. Supreme Court U. S. October term, 1905. Term Nos., 346, 347, and 348. The United States, appellant, v. The Cherokee Nation; The Eastern Cherokees, appellant, v. The Cherokee Nation; The Cherokee Nation, appellant, v. The United States. Stipulation of counsel and addition to record. Filed Nov. 10th, 1905.

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Office Supreme Court U. S.
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DEC 18 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 346.

THE UNITED STATES, APPELLANT,

vs.

THE CHEROKEE NATION.

No. 347.

THE EASTERN CHEROKEES, APPELLANT,

vs.

THE CHEROKEE NATION.

No. 348.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Motion on Behalf of the United States and the Cherokee Nation to Enlarge the Time for Argument and to Designate the Order Thereof.

Now come The United States and The Cherokee Nation, parties to the above-entitled causes, and, referring to the order of this honorable court heretofore passed herein

advancing the above causes and assigning same for argument on January 2, 1906, "as one cause," respectfully move the court as follows:

1. That the time for argument of said causes be enlarged so as to allow at least three hours to each party appearing upon the record.

2. That each party may be heard by two counsel, if so desired.

3. That this court will designate the order in which counsel for the respective parties appellant shall be heard.

As ground for such motion and each subdivision thereof the attorneys for the moving parties respectfully state as follows:

First. That by section 68 of the act of Congress of July 1, 1902 (32 Stats., 726), jurisdiction was conferred upon the Court of Claims to adjudicate "any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," and a right of appeal to this court was likewise conferred upon any party in interest feeling aggrieved at the decision of the Court of Claims in the premises.

Second. Under the provisions of such statute the Cherokee Nation, by its duly authorized attorneys, on February 20, 1903, filed its petition in the Court of Claims asking judgment against the United States upon four separate items, including among the others a certain item in the sum of $1,111,284.70, with interest thereon at 5 per cent. per annum from June 12, 1838, to date of payment. Said petition was docketed as number 23,199 on the general jurisdiction docket of said court.

Third. By an act of March 3, 1903 (32 Stats., 996), the Congress declared that said section 68 of said act of July 1, 1902, should "be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi river, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section."

Fourth. Thereafter, on March 10, 1903, a petition was filed and docketed in said Court of Claims as number 23212, general jurisdiction, on behalf of certain so-called "Eastern and Emigrant Cherokees" "residing for the most part in Cherokee, Graham, Swain, and Macon counties, in North Carolina," and elsewhere. By said petition claim was made on behalf of a considerable number, stated at 3,500 individuals, against the United States to recover by judgment in their favor a proportionate share of the item of $1,111,284.70 and interest, above referred to.

Fifth. On March 14, 1903, a further petition was filed and docketed in said Court of Claims as number 23214, general jurisdiction, on behalf of "the Eastern Cherokees," whereby judgment was prayed against the United States in favor of said "The Eastern Cherokees" for the full amount of said item of $1,111,284.70 and interest.

Sixth. To each of said petitions the United States filed a general traverse, and upon motion of the Assistant Attorney General the several claimants above named were "required to interplead," and the causes were ordered to "be consolidated and brought to trial as one case without prejudice to the several rights of the parties claimant."

Seventh. Said consolidated causes having been argued and submitted to the Court of Claims, said court, on May 18,

1905, entered a judgment in favor of the Cherokee Nation and against the United States for the entire amount claimed by the former upon each of the four items specified in its petition, including said item of $1,111,284.70 and the interest thereon.

Eighth. In entering its judgment in favor of the Cherokee Nation the Court of Claims directed that the amounts found to be due to said nation upon three of the items claimed, including said item of $1,111,284.70 and interest, should be paid to the Secretary of the Interior, to be by him distributed to the persons entitled thereto in accordance with the detailed terms of the judgment of said court.

Ninth. From said judgment in its entirety the United States has prayed their appeal to this court.

"The Eastern Cherokees" have appealed from so much thereof as directed judgment in favor of the Cherokee Nation, while the latter has appealed solely from so much of said judgment as provided that "the sum of $1,111,284.70, with interest thereon from June 12th, 1838, to date of payment, less certain counsel fees and expenses," should be paid to the Secretary of the Interior, to be by him distributed to persons found to be equitably entitled thereto.

From the foregoing statement it will appear that this contest is at least a three-sided one; that the Cherokee Nation, the Eastern Cherokees, and the Eastern and Emigrant Cherokees all claim a right of recovery as against the United States, in so far as the item of $1,111,284.70 and interest thereon from June 12, 1838, is concerned, and to that extent all are jointly concerned in the outcome; but while the Cherokee Nation claims the right to recover as a political body for the benefit of all of its component members, including "The Eastern Cherokees" and "The Eastern and

Emigrant Cherokees," said "Eastern Cherokees" and "the Eastern and Emigrant Cherokees" claim the right and benefits of such recovery to the exclusion of a large body of Indians forming component elements of the Cherokee Nation.

The rights and obligations of the parties to this triangular controversy depend upon the construction and application of the provisions of a series of treaties between the United States and the Cherokee Nation and the United States and the "Eastern Cherokees" and the "Western Cherokees" or "Old Settlers," and also upon the terms of a long series of statutes of the Untied States enacted in furtherance of said treaties.

If there were no differences between the Cherokee Nation and the Eastern Cherokees, it would hardly be possible within the limits of the four hours allotted to the consolidated causes to properly and adequately make known to this court the many grounds of difference between the United States and the Cherokee Nation upon which the right of the latter to maintain its judgment against the former depend.

In view of the controversy between three claimants, which is subordinate in name only to the general claim of all against the United States, adherence to the rules usually governing the argument of causes in this court would not only possibly prevent important contending interests from being heard by counsel at all, but would render impossible any adequate presentation of the equities of such contending parties growing out of and based upon the alleged contemporaneous construction and administration of the treaties of 1835 and its supplement of 1836 and the treaty of 1846, all between the United States and the Cherokees, and the acts of Congress in furtherance thereof.

It is therefore respectfully requested that three hours of time may be granted to each of the three parties appellant, and that each may be heard by two counsel, if so desired.

In view of the importance of these cases to the parties claimant, the many years which have elapsed since the controversy involved was initiated, and the large amount involved, for which judgment has been given against the United States, it is confidently hoped that the extension of time requested will not be deemed unreasonable or illy founded.

Counsel representing the various contending parties have been unable to agree among themselves as to the order in which their respective arguments shall be submitted to this court.

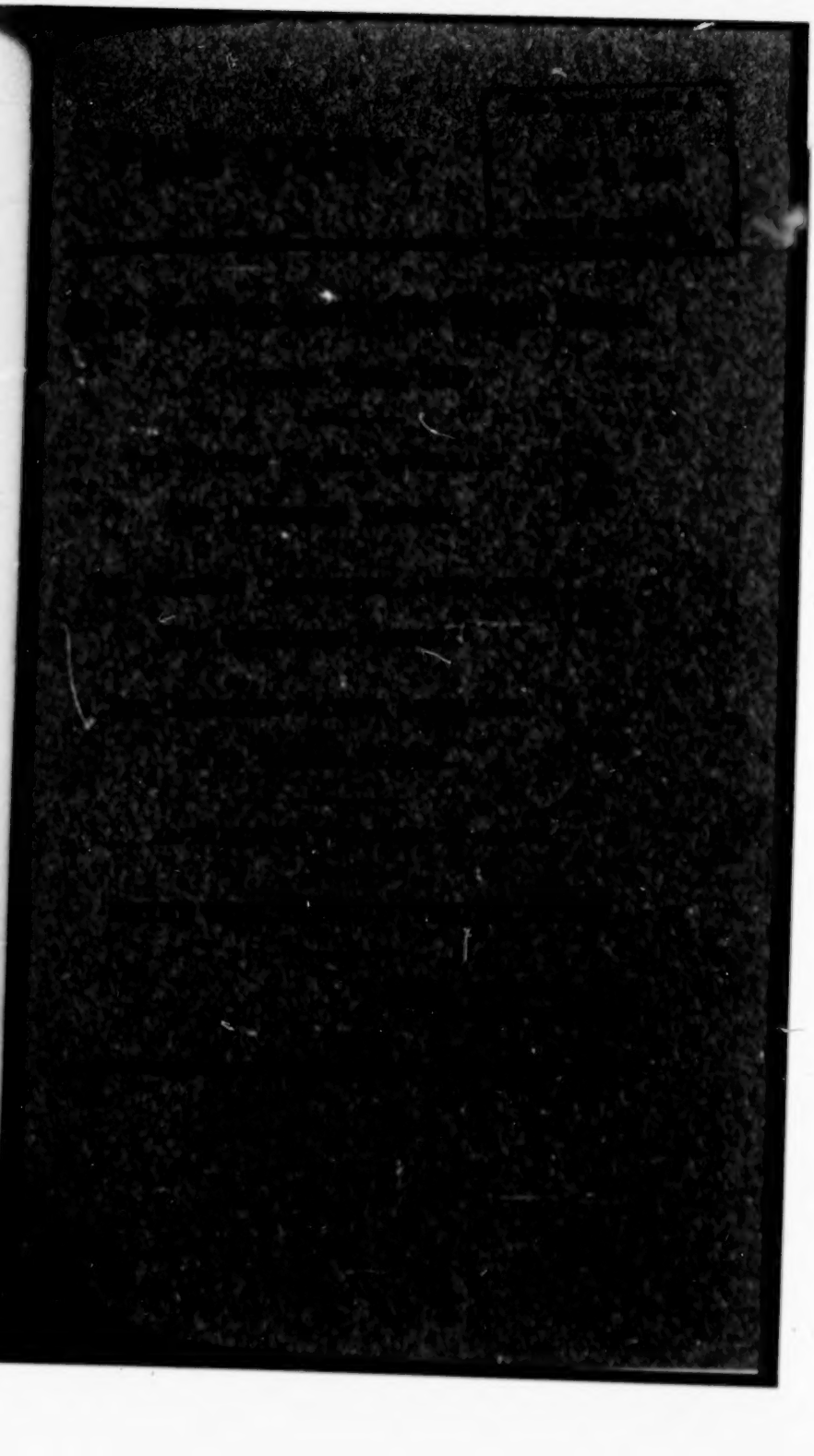
Notwithstanding the settled rule or practice of this court in cases involving appeals and cross-appeals, counsel for the United States contends that as the judgment in question is against the United States and in favor of the Cherokee Nation for the full amount claimed by the latter, and that as the appeal by the former was from the judgment in its entirety, the right to both open and close the series of arguments belongs to the United States. To this counsel for the Cherokee Nation assent, and it is understood that counsel for The Eastern Cherokees do not strenuously contend otherwise.

As the judgment in its entirety must be defended by the Cherokee Nation, counsel for that body suggest that logically the opening argument on behalf of the United States should be followed by the opening in reply on behalf of the Cherokee Nation. As the claim of "The Eastern Cherokees" and "The Eastern and Emigrant Cherokees" involves but a single one of the items included in the judgment appealed from, and also involves the single question as to whether the judgment against the United States, if sustained by this court, should remain in favor of the Cherokee Nation, or be modified so as to run in favor of said "Eastern Cherokees" or "The Eastern and Emigrant Cherokees," or either of them, it would seem that the argument in their behalf logically should follow the opening on behalf of the Nation, with

a right of reply in the latter, the entire argument to be closed by counsel for the United States.

It is understood that the contentions of counsel for The Eastern Cherokees in this connection will be laid before the court in a separate motion paper.

LOUIS A. PRADT,
Assistant Attorney General.
CHARLES NAGEL,
EDGAR SMITH,
FREDERIC D. MCKENNEY,
Attorneys for the Cherokee Nation.



In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT, *v.* THE CHEROKEE NATION,	No. 346.
THE EASTERN CHEROKEES, APPELLANTS, *v.* THE CHEROKEE NATION.	No. 347.
THE CHEROKEE NATION, APPELLANT, *v.* THE UNITED STATES.	No. 348.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The jurisdiction of the court in these cases was conferred through two acts of Congress, the first being section 58 of the act of July 1, 1902 (32 Stat. L., 726), giving jurisdiction to the Court of Claims to examine, consider and adjudicate any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States. This was followed by the act of

March 3, 1903 (32 Stat. L., 996), which provides that the section above referred to should be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all purposes of such section, and further that said section should be so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section on a claim mentioned in House of Representatives Executive Document No. 309, of the second session of the Fifth-seventh Congress. The claim thus mentioned is the same claim that is here in question.

Pursuant to these jurisdictional acts the Cherokee Nation filed a petition on February 20, 1903, in which they recited an accounting rendered pursuant to the treaty of March 3, 1893 (47 Stat. L., p. 64), by Messrs. Slade & Bender, asking for judgment upon such accounting as follows:

For $2,125 with interest thereon at the rate of 5 per cent per annum from February 27, 1819, until paid.

$1,111,284.70, with interest thereon at the rate of 5 per cent per annum from June 12, 1838, until paid.

$432.28 with interest thereon at the rate of 5 per cent per annum from January 1, 1874, until paid.

And further, for the restoration to the Cherokee funds the sum of $20,406.25, with interest thereon

at the rate of 5 per cent from July 1, 1893, until the date of restoration.

On March 20, 1903, a petition was filed on behalf of certain Eastern Cherokees living east of the Mississippi River, claiming their pro rata share of—

> That portion of the removal and subsistence fund improperly taken by the United States from the five million fund on account of removal of Eastern Cherokees, as found by the expert accountants, Messrs. Slade & Bender, April 28, 1894, the said five million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the Government to the Eastern Cherokees for the sale of their lands in North Carolina, Georgia, and Tennessee, or east of the Mississippi River, as set forth in article 1st of the treaty of New Echota, in north Georgia, on March 14, 1835, and articles 2 and 3 of the supplemental treaty, proclaimed May 23, 1836, this sum so misapplied amounting, in accordance with said accounting, to $1,111,284.70, with interest at 5 per cent per annum from the date of said wrongful taking, June 12, 1838, to date. (R., p. 6.)

This petition was amended September 3, 1903, and at that time the parties plaintiff took the title of the Eastern and Emigrant Cherokees.

On March 14, 1903, a petition was filed on behalf of all the Eastern Cherokees, both west and east of the Mississippi River, alleging in substance that there was due to the Eastern Cherokees, upon the account of Slade & Bender above referred to, the sum of

$1,111,284.70, with interest from June 12, 1838, as an award against the United States or, if the court should not hold said account as an award, the sum of $1,761,447.27, with interest at 5 per cent from the same date, together with interest on the income annually accruing, at the rate of 5 per cent per annum until paid, by virtue of the treaties of 1828 (7 Stat. L., 313) and the treaty of 1835–36, commonly known as the "treaty of New Echota." At the trial of the case, however, no contention was made for this larger amount.

March 7, 1904, the various three cases were ordered to be consolidated and brought to trial as one case. As a result of the trial of the consolidated cases, judgment was entered decreeing that the plaintiff, the Cherokee Nation, recover the various amounts claimed by it in its petition; that the three smaller amounts be paid to the nation itself, and that the sum of $1,111,284.70, with interest at 5 per cent, from June 12, 1838, until the date of payment, after deducting certain costs and expenses, be distributed directly to the Eastern or Western Cherokees, who were parties either to the treaty of New Echota as proclaimed May 23, 1836, or to the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representative of such individuals. (R., 112–113.)

Only this main item of $1,111,284.70 and interest was contested at the trial by the United States.

The case was at first held by the court to be a suit in equity (R., p. 53), but subsequently,

and to save all question, at the request of the claimants various findings of fact were made by the court. These findings, however, amount practically to a mere compilation of facts appearing in portions of various official documents and records of which this court would take judicial notice without such findings, and hence they do not have the exclusive force and authority which is usually attributed by this court to the findings of the Court of Claims. Accordingly, in the following recital of the main facts in the case, reference will be made not only to the findings of fact, but also to various public documents and records where it seems necessary to supplement those findings.

THE FACTS.

Prior to the year 1808 the Cherokee Nation of Indians was domiciled in Georgia, Alabama, Tennessee, North Carolina, and South Carolina, where they owned and possessed about 14,000,000 acres of land. Subsequent to that date various treaties were made between the Cherokees, or certain of them, and the United States, as a result of which a portion of them removed west of the Mississippi upon lands given to them on the Arkansas River by the United States, their holdings east of the Mississippi being surrendered to the United States. By 1819 it was estimated that two-thirds of the Cherokees were east of the Mississippi and one-third west of that river.

On the 6th of May, 1828, a treaty was made with the Western Cherokees alone by which the United States agreed to put the Cherokees in possession of 7,000,000 acres of land in what is now known as the Indian Territory, and to give to the Cherokee Nation a perpetual outlet west of these lands (7 Stat. L., 311). The treaty contained an agreement to encourage the emigration of the Cherokees then east of the Mississippi by agreeing, among other things, to pay the cost of the emigration of any Eastern Cherokee who might desire to move west, upon enrolling himself for emigration, and his subsistence for twelve months after such emigration. On their part the Western Cherokees receded to the United States the lands which had been ceded to them on the Arkansas.

About this time the Cherokees remaining east of the Mississippi became involved in various difficulties with the authorities of the States in which they were residing, and were made subject to severe and oppressive laws in those States, all growing out of a desire for their departure. (*Eastern Band of Cherokees* v. *The United States*, 20 Court of Claims, 449; *The Cherokee Trust Funds*, 117 United States, 288.)

There grew out of this condition of things the treaty of New Echota, which was negotiated in 1835. It recited in the preamble the desire of the Cherokees to be freed from the difficulties they experienced in the States, and to be united in one

body in a permanent home without the territorial limits of the States' sovereignties.

By article 1 the Cherokees ceded to the United States all the lands claimed, owned, or possessed by them east of the Mississippi River, and all claims of spoliation of every kind, in consideration of the sum of $5,000,000, but with the further provision that there be submitted to the Senate of the United States the question of whether this sum was intended to include spoliations, and if not that an additional sum of $300,000 be allowed for the same.

Article 2 provided that $500,000 of said $5,000,000 should be applied in payment for an additional grant of 800,000 acres in addition to the 7,000,000 acres ceded by the treaty of 1828 and supplemental treaty of 1833 to the Cherokee Nation.

Article 9 made provision for the valuation of improvements and ferries in possession of the Eastern Cherokees.

Article 10 provided for investment of a portion of the $5,000,000 for the benefit of the Cherokees.

Other articles related to the payment of certain claims of individual Indians against white citizens of the United States and made provision for reservations and preemptions.

Out of articles 8 and 15 arose the controversy which is the subject of this appeal. The following is their full text:

> ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to

their new home, and to subsist them for one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably and so as to not endanger their health, and that a physician, well supplied with medicines, shall accompany each detachment of emigrants removed by the Government.

ARTICLE 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment of improvements, ferries, claims for spoliation, removal, subsistence, and debts and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer classes of Cherokees, and the several sums to be invested for the general national fund provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all of the people of the Cherokee Nation east, in accordance with the census just completed.

By article 16 it was stipulated that the Cherokees should remove to their new homes within two years from the ratification of this treaty.

Neither the "Western Cherokees," or "Old Settlers," nor the great body of the "Eastern Cherokees" were parties to this treaty, and they at all times up to the making of the treaty of 1846 repudiated it on the ground that its execution had not been authorized by them or their representatives in council.

The small number of Cherokees east of the Mississippi who negotiated the treaty were called or styled the "Treaty Party."

The leaders of the treaty party who had signed the treaty of 1835 contended that the sum of $5,000,000 was not intended to include the amount which might be required to remove them.

On March 1, 1836, the following supplementary articles, were adopted as part of the treaty by the Senate:

> ARTICLE 1. It is therefore agreed that all the preemption rights and reservations provided for in articles 12 and 13 shall be and are hereby relinquished and declared void.
>
> ART. 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question; and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above-mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provi-

sion should be made therefor as might appear to the Senate to be just.

ART. 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions, and of the sum of three hundred thousand dollars for spoliations described in the 1st article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate, and if they shall approve the same then this supplement shall remain part of the treaty.

The treaty and the supplementary articles were ratified and adopted as one instrument and proclaimed May 23, 1836.

On July 2, 1836, Congress appropriated the sum of $600,000, pursuant to the terms of the third supplementary article of said treaty. This sum proved to be insufficient for the purposes for which it was appropriated. The majority of the Eastern Cherokees who were in the east subsequent to the ratification

of the treaty of the New Echota were greatly averse to emigration. They resisted every argument and persuasive means that could be used to induce them to be removed in accordance with the treaty, and the result was that in May, 1838, preparations were made by the Government to compel their removal, and Gen. Winfield Scott, with a military force, placed them in camps of concentration for that purpose.

On the 23d of May, 1838, the House of Representatives passed a resolution requiring a statement of the amount that would be required for the additional allowance proposed to be made to the Cherokees by the Executive Department. On May 25, 1838, the Secretary of War submitted the following estimate of what it would cost the United States to remove and subsist the Cherokees as proposed, to wit:

> In compliance with the resolution of the House of Representatives of the 23d instant, requiring a statement of the amount that will be required for the additional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

The payment of expenses of removing the remaining Cherokees, estimated at 15,840, at $30 a head	$475,200
Amount applicable to that purpose	39,300
Balance to be provided for	435,900

If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival in the West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated to be paid by treaty, namely, $33.33 a head	$611,167
Total	1,047,067

(H. R. Ex. Doc. No. 182, Fifty-third Congress, third session, p. 10.)

On June 12, 1838, Congress appropriated the full amount estimated by the Secretary of War as sufficient to remove and subsist the Cherokees, as follows:

> SEC. 2. *Be it further enacted*, That the further sum of one million forty-seven thousand and sixty-seven dollars be appropriated, out of any money in the Treasury not otherwise appropriated, in full for all objects specified in the third article of the supplemental articles of the treaty of 1835 between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of said sum of money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty: *And provided further*, That said Indians shall receive no benefit from said appropriation unless they shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of the Government.

Shortly after this appropriation, the Cherokee Indians being at the time collected into camps and contracts having been entered into with some of the firms for their subsistence and removal, negotiations were entered into by representatives of the Indians headed by John Ross, principal chief of the tribe, with General Scott for the removal of the Indians by the nation. In the course of these negotiations a delegation was appointed by the Cherokees to make arrangements for such removal, and on the 31st of July these delegates submitted an estimate of the expenses which amounted to $66.24 per capita. This estimate was considered by General Scott to be extravagant, and he so informed the Cherokee delegates, but finally agreed to it after admonishing them that the cost as well as the comfort of removal was a matter in which the Cherokees were exclusively interested. (Report No. 288, 27th Cong., 3d sess., pp. 2, 10, 12.) Thereafter the removal was effected. The cost of it, however, proved to be greater than the contract price which, at $66.24 per head, amounted to $776,398.98. This amount was paid on the 13th of November, 1838, but the whole claim, as presented by Mr. Ross, was $1,263,338.38, or at the rate of $103.25 per head. This additional amount of $486,939.50 was rejected by the Commissioner of Indian Affairs, but was finally allowed by the Secretary of War, and on September 17, 1841, was paid to John Ross, the principal chief and agent of the Cherokee Nation,

specially authorized by the national council to apply for and receive the same.

In addition to this there was paid to John and Lewis Ross, August 16, 1841, on account of carrying into effect a treaty with the Cherokees, allowed by the Secretary of War, $94,407.38, making a grand total of $1,357,745.92. (H. Rep. 288, 27th Cong., *supra*, pp 2–3; House Report 1098, p. 68.)

The above grand total is the amount stated in the findings of the court as paid to John and Lewis Ross for the removal of the main body of the Cherokees in 1838 (Record, p. 90). After the removal of the Eastern Cherokees bitter controversies arose between them and the Western Cherokees or Old Settlers as to the occupancy of and title to the lands in the West and the right of government of the nation, resulting in scenes of disorder of the gravest character. Out of this condition grew the treaty of August 6, 1846 (9 Stat. L., 871), the preamble of which declared:

> Whereas serious difficulties have for a considerable time past existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people against the United States: Therefore, with a view to the final and amicable settlement of the claims before men-

tioned, it is mutually agreed by the several parties to this convention as follows:

The first article provides that the lands occupied by the Cherokee Nation shall be secured to the whole people and a patent shall be issued to them by the United States.

The second article adjusts all difficulties in dispute and declares for a general amnesty to be issued, etc.

The third article provides that the Cherokees shall be reimbursed for certain charges which have been improperly made by the United States against the treaty fund of $5,000,000.

The fourth article provides for the equitable interests of the Western Cherokees in the lands ceded by the treaty of 1828, and how the value of the said interest shall be ascertained, as follows:

> Now, in order to ascertain the value of that interest it is agreed that the following principle shall be adopted, viz, of the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to $5,600,000 (which investments and expenditures are enumerated in the fifteenth article of the treaty of 1855), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would under such marshaling of accounts be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and

> then allow to the Old Settlers (the Western Cherokees) a sum equal to one-third part of such residuum to be distributed per capita to each individual to such part of the Old Settlers, or Western Cherokees. It is further agreed that, so far as the Western Cherokees are concerned, in assessing the expense of removal and subsistence of the Eastern Cherokees to be charged to the aggregate fund of $5,600,000, above mentioned, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835, as commutation money in those cases in which the members entitled to it removed themselves, shall be adopted. (See 27 C. Cls. R., 47, and 148 U. S., 475.)

By the ninth article of this treaty the United States agrees to make a fair and just settlement of all moneys due to the Cherokee Nation under the treaty of 1835, "which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, etc."

The eleventh article of this treaty provided for the submission to the United States Senate of the question of whether the amount expended by the United States for one year's subsistence of the Eastern Cherokees after their removal to the Indian Territory should be borne by the Indians and charged to the treaty fund. In pursuance of this submission the Senate decided that such cost should not be borne by the Indians nor charged to the treaty fund, and the amount thereof was reimbursed to the Indians.

It was also proposed in the twelfth article of the treaty to likewise submit to the decision of the Senate the question of whether the expense of the removal of the Eastern Cherokees was to be borne by the Government or by the Indians, but this article of the treaty was rejected by the Senate. (9 Stats., 877.)

Under the fourth article of the treaty of 1846 the accounting officers of the United States made and prepared for settlement the account for the Western Cherokees provided for therein. In stating this account there was charged against the treaty fund of $5,600,000 for removal and subsistence of 18,026 Indians, at $53.33⅓ per head (being $20 for removal and $33.33⅓ for subsistence), the sum of $961,386.66. As thus stated the account showed a balance of $1,571,346.55, and, pursuant to the provisions of said section, the amount found due the Western Cherokees was a sum equal to one-third of said residuum, or $523,448.85. (R., p. 97.)

Shortly after this the Senate of the United States, acting as umpire under Article II of the treaty of 1846, on September 5, 1850, passed the following resolution:

> *Resolved by the Senate of the United States,* That the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the

amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury.

Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid.

This amount was accordingly appropriated by Congress for that purpose by the act of September 30, 1850, with the proviso that interest be paid on the same at the rate of 5 per cent per annum, according to a resolution of the Senate of the 5th of September, 1850 (9 Stat. L., p. 556). (R., p. 97.)

Subsequent to the passage of this resolution the accounting officers of the United States, under the ninth article of 1846, made and prepared for settlement the account for the Eastern Cherokees, provided for by that article. In stating this account the total amount expended for removal and subsistence, being $2,823,192.93, was charged against the aggregate of the treaty fund of $5,600,000 and the additional appropriation of $1,047,067, amounting to $6,647,067, as directed in said section nine. But this charge was reduced by crediting the Indians in said statement with the sum of $189,151.24, appropriated pursuant to the resolution of the Senate of September 5, 1850, above cited. Upon this statement there was found a balance due the Eastern Cherokees of $914,026.13.

Appropriation was made by Congress for the payment of the amounts thus found due to the Western Cherokees and the Eastern Cherokees, respectively, as follows:

[Act of September 30, 1850 (9 Stats. L., 523, 556).]

To the "old settlers" or "Western Cherokees," in full of all demands, under the provisions of the treaty of sixth August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, five hundred and thirty-two thousand eight hundred and ninety-six dollars and ninety cents; and that interest be allowed and paid upon the above sums due respectively to the Cherokees and "old settlers," in pursuance of the above-mentioned award of the Senate, under the reference contained in the said eleventh article of the treaty of sixth August, eighteen hundred and forty-six: *Provided*, That in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due: *Provided also*, That the Indians who shall receive the said money shall first respectively sign a receipt or release, acknowledging the same to be in full of all demands under the fourth article of said treaty.

[Act of February 27, 1851 (9 Stat. L., 570, 572).]

For payment to the Cherokee Nation the sum of seven hundred and twenty-four thousand six hundred and three dollars and thirty-seven cents, and interest on the above sum at the rate of five per centum per annum, from

twelfth day of June, eighteen hundred and thirty-eight, until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated; but no interest shall be paid after the first of April, eighteen hundred and fifty-one, if any portion of the money is then left undrawn by the said Cherokees: *Provided, however*, That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation, and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees: *And provided further*, That the money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of sixth August, eighteen hundred and forty-six.

Before the payment of the amounts thus found due in said accounts the Western Cherokees, on September 22, 1851, made a separate protest against the proposed settlement with them (Old Settlers case, 27 C. Cls., 9); and on the 27th of November, 1851, the Cherokee National Council protested against both

the accounts, one ground of the protest being that a part of the cost of the removal of the Indians was charged to the original $5,000,000 treaty fund in the account with the Eastern Cherokees.

Thereafter said balance of $914,026.13, with interest at 5 per cent from June 12, 1838, was duly paid and distributed to and among the Eastern Cherokees *per capita* and the individual Eastern Cherokees executed and delivered to the United States a full and final discharge of all claims and demands whatsoever on the United States, as required by the statute making the appropriations.

This discharge was in the form following:

> We the undersigned emigrant or Eastern Cherokees, do hereby acknowledge to have received from John Drennan, Superintendent Indian Affairs, the sums opposite our names, respectively, being in full of all demands under the treaty of sixth of August, eighteen hundred and forty-six, according to the principles established in the ninth article thereof, and appropriated by Congress per act 30th of September, 1850, and per act 27th of February, 1851, which reads as follows:
>
> "And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by treaty to pay to said Cherokee Nation,

> and except also such money and lands, if any, as the United States may hold in trust for said Cherokees."

And thereafter the said balance of $532,782.18, with interest at 5 per cent from June 12, 1838, was appropriated by Congress and was duly paid and distributed to and among the Western Cherokees *per capita*, and the individual Western Cherokees executed and delivered to the United States a discharge in the following form:

> We, the undersigned "Old Settlers" or Western Cherokees, do hereby acknowledge to have received from John Drennan, Supt. of Indian Affairs, the sums set opposite our names respectively, being in full of all demands under the provisions of the treaty of the sixth of August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, as per act entitled: "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30th, one thousand eight hundred and fifty-one," approved September 30th, 1850. (R., pp. 99–100.)

Pursuant to the jurisdictional act of Congress of February 29, 1889 (25 Stat., 694), the "Old Settlers," or Western Cherokees, brought suit in the Court of Claims to recover the additional amount claimed by them over and above the amount which they had received in the settlement made with them

pursuant to the fourth article of the treaty of 1846. The substantial basis of this claim was the contention that in that account the cost of subsistence had been charged against the treaty fund of $5,600,000, contrary to the resolution of the Senate September 5, 1850. This claim was allowed by the Court of Claims, and further reductions of the charges against the treaty fund were made by diminishing the number of Indians for whom removal was to be charged and the charge for debts and claims and the cost of the Cherokee committee, with a result that there was found due to the Western Cherokees an additional balance of about $225,000, with interest at 5 per cent from June 12, 1838, pursuant to the resolution of the Senate above referred to.

On appeal to this court the amount of the judgment was reduced about $13,000, but in all other respects it was affirmed (27 C. Cls., 1; 148 U. S., 427).

On the 19th of December, 1891, a treaty was negotiated between the Cherokee Nation and the Commissioners appointed by the President for the cession to the United States of the Cherokee Outlet, in consideration of the sum of $8,600,000 in round numbers and various agreements, the fourth being—

> The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828,

> 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting. (R., pp. 103–104.)

The treaty was duly ratified and it went into effect by the act of Congress of March 3, 1893 (27 Stat. L.,

640). The Commissioner of Indian Affairs, in a report to the Secretary of the Interior on February 6, 1892, made the following comment upon this agreement for an accounting in the treaty:

> Particular attention is called to section 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions.
>
> In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this Office within a reasonable time, say, about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill

> for the ratification of the agreement, herewith inclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose. (R., p. 105.)

The act of March 3, 1893, ratifying said agreement for the purchase of the "Cherokee Outlet" also provided as follows:

> The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement.

Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was by the Secretary of the Interior referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof

to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted was accepted by the Cherokee Nation by an act of its national council approved December 1, 1894, and no suit was thereafter brought by the Cherokee Nation against the United States charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its national council above referred to, did notify the Secretary of the Interior of the acceptance by said nation of said account as so stated by Messrs. Slade and Bender, and did request said Secretary of the Interior to notify the Congress of the United States of such acceptance, and on the 7th of January, 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

> SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stats., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified

copy of an act of Cherokee national council accepting such accounting.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES. (R., pp. 107.)

The Slade and Bender account above referred to appears in Executive Document No. 182, Fifty-third Congress, third session. In stating this account the accountants considered the treaty of New Echota, the appropriation statute of June 12, 1838, and the treaty of 1846, and reached the conclusion that the cost of removal of the Cherokees was an expense to be borne wholly by the United States, and pursuant to this conclusion, stated the account as to this item as follows:

> Upon the assumption that the United States was to pay the expense of removal, there is due the Cherokee fund the sum of $1,111,284.70.

In the appropriation act of March 2, 1895, the Attorney-General of the United States was directed to review and report upon the conclusions of law contained in the Slade and Bender report, and on December 2, 1895, that officer made the report requested. It contains the following statement relative to the claim here at issue:

> The chief item in the schedule of amounts found due from the Government to the Cherokee Nation is the amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to the treaty fund, $1,111,284.70. After careful consider-

ation I am unable to concur in the conclusion of the Department of the Interior as to this item.

After the receipt of this report from the Attorney-General no further action was taken by Congress upon the Slade and Bender report.

ASSIGNMENTS OF ERROR.

The following assignments of error are relied upon on this appeal:

1. The court erred in adjudging that the Cherokee Nation recover from the United States the sum of $1,111,284.70, being part of the cost of the removal of the Eastern Cherokees to the Indian Territory charged against the treaty fund of $5,000,000 of the treaty of New Echota.

2. The court erred in adjudging that the Cherokee Nation recover from the United States interest at 5 per cent upon the sum of $1,111,284.70, from June 12, 1838, to the date of payment, or any interest whatever upon said sum or any part thereof.

ARGUMENT.

The Slade and Bender Account.

The first matter for consideration in discussing this claim is the legal effect and binding force of the accounting or report made by the accountants Slade and Bender, appointed pursuant to the agreement for such accounting in the treaty of 1893.

There was a great diversity of opinion on this score in the Court of Claims.

In the opinion of the court written by the chief justice, this accounting of Slade and Bender, declared upon in the petition of the Cherokee Nation as an award, or at least an account stated and solely relied upon therein, is characterized as lacking in every element of an award and having no semblance to an account stated. The reasoning upon which this conclusion is based is so complete and unanswerable that the court is here referred to the same with great confidence. (Rec., pp. 48, 49.) One associate justice concurring and another dissenting agreed absolutely with this conclusion, whilst the fourth associate justice, also concurring, declined to express any opinion upon the subject. And yet this same accounting, so devoid of inherent standing in court, was made the sole basis of a judgment in favor of the claimants by the chief justice and one associate, without any attempt to inquire into the legal status of the claim. Indeed,

the chief justice was constrained to state that, strictly speaking, it had no legal status, using the following language:

> For if the proposed suit of the Cherokees was to be decided *strictissimi juris*, i. e., upon technical defenses, it had already been decided against them. (Rec., p. 49.)

The learned chief justice here had in mind the decision in the case of the Court of Claims in the case of *Western Cherokees* v. *The United States* (27 C. Cls., 46, affirmed by this court in 148 U. S., 427). Again, upon the question of interest, involving the enormous sum of $3,700,000, more than three times the amount of the principal, and respecting which a separate ground of defense had been urged on behalf of the United States—two of the justices of the Court of Claims adopt, without a word of discussion of that contention, the casual finding in the Slade and Bender accounting upon this item, whilst the third member of the majority, after stating with approval the reasoning of the counsel for the United States on this question, reluctantly yielded the point to his associates against his better judgment. So that as to three-fourths of the vast judgment recovered by the claimants the decision was virtually rendered by an equally divided court.

The arguments advanced for attaching this peculiar sanctity to the Slade and Bender account are: First, that just such an account was contemplated by the agreement in the treaty of

1893, pursuant to which it was stated, and therefore it constituted a part of the consideration for the cession of the Cherokee outlet in that treaty. Practically the same argument is also presented thus: That if the accountants, Slade and Bender, had stated the account as it really was—that is to say, as it appeared upon the books of the United States, and not as they conceived that it ought to have been kept by the United States—it would have been apples of Sodom to the Cherokees, since the result could only have been that the Cherokees in contesting that account in the Court of Claims would "come into court to be immediately turned out under previous decisions." (Rec., p. 50.) As to this latter contention it would seem to be enough to reply in passing that, however untrammeled by its former decisions and by a previous formal compromise and settlement of this very claim by the Cherokees, the Court of Claims might have felt itself to be, if this claim had come before it by reason of a proper statement of the account pursuant to the agreement in the treaty of 1893—nevertheless Slade and Bender, being merely accountants, without a vestige of the power of arbitrators, had no authority whatever to arrogate to themselves this high prerogative; that, laymen as they were, it was their simple duty to take the account as they found it, and especially to obey the law governing this claim as it had been expressly laid down two years before in the case of the Western Cherokees.

The extent of the legal and equitable jurisdiction assumed by Slade and Bender is to be seen from the fact that their conclusion that the sum of $1,111,284.70, part of cost of removal of the Eastern Cherokees, had been improperly charged to the treaty fund involved, first, a construction of the treaty of 1835 and the supplementary treaty of 1836; second, a construction of the agreement between the Cherokee Nation and General Scott in 1838; third, a construction of the treaty of 1846; fourth, a determination as to the legal effect of a final settlement in 1852, with receipts in full for all claims against the United States, including this claim.

The settlement above mentioned was alone absolutely conclusive upon these accountants. True a very similar settlement was pleaded by the United States in ~~behalf~~ bar of the claim in the case of the *Old Settlers* v. *The United States*, and the general sufficiency of the plea was acknowledged both in the Court of Claims and in this court, but it was ~~so held~~ overruled because the special jurisdictional act under which that case was brought disclosed the fact that Congress was convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to and desired to have it remedied, "and that the jurisdictional act passed in effectuation of such intention left it open to the courts to readjust the amount, notwithstanding the claim might have been theretofore settled." (148 U. S., pp. 475–476.)

Thus at the time that Slade and Bender went back of this settlement of 1852 it had been pointed out by this court that that was a matter for the courts, and then only by virtue of a special jurisdictional act. But Slade and Bender "cared for none of these things" and did not even refer to either settlement or receipts.

The second argument is: That the statement of the account of Slade and Bender being in favor of the Cherokees, they were thereby precluded from contesting it and having this claim adjudicated in the Court of Claims, as provided for in the agreement, and thus lost a substantial right, so that in the present action the United States should be held estopped to dispute the validity of their account.

These arguments will be considered in their order.

The Slade and Bender report was not such an accounting as was contemplated by the treaty of 1893, and therefore did not bind the United States.

As to the contention that the account to be rendered pursuant to the treaty of 1893 constituted a part of the consideration for the lands ceded to the United States by the Cherokees there is no controversy, but it does not follow, as further urged, that an account in the form that it was rendered by Slade and Bender was the account contemplated; that an account, which in the language of Judge Weldon, should be "a statement of the account founded upon the legal theory of the Cherokee Nation" (Rec., p. 58),

was a part of the consideration of the treaty of 1893. If that were what was intended the agreement could easily, and would have so stated expressly. But in that event it is clear that the agreement could not and would not have contained a provision for challenging the account by the Cherokees through suit in the Court of Claims. For certainly nothing more incongruous and superfluous can be imagined than solemnly to provide the means by which a party might contest a decision in his own favor. But the agreement did contain exactly that provision, the significance of which is not to be overlooked and can not be explained away. And how is that provision to be given force and meaning? The answer seems plain. The accountants were appointed to go over all the treaties named and all the various appropriation statutes passed pursuant or with relation thereto, and thus ascertain the several amounts of money which were to be credited to the Cherokees; then from the books of the United States, the only books of account relating to the subject (Rec., bottom p. 104, top p. 105), they were to ascertain what disbursements and payments had been debited to these various credits by the Government upon its construction of the treaties, and what balance, if any, of those credits remained unpaid. That would have been an accounting—a statement of the account drawn from the books—fulfilling the whole duty of the accountants. And who ever heard before of accountants doing anything more than that, of assuming to state an account, not as shown by the books but according

to their own notions as to what the books ought to have shown? And if those extraordinary accountants, Slade and Bender, instead of airily deciding vexed and perplexing questions of treaty construction in bland ignorement, or more likely ignorance, of an express judicial decision to the contrary; if instead of this exercise of mistaken and ill-advised judicial functions they had rendered their account in the usual and ordinary way, it would have shown in so many words and figures that the sum of $1,111,284.70 had been paid out of the original $5,000,000 consideration of the treaty of 1835 as part of the cost of the removal of the Eastern Cherokees, with the inevitable result of a suit in the Court of Claims by the Cherokee Nation to recover that amount from the United States on the ground that it was an "amount of money promised but withheld by the United States from the Cherokee Nation under said treaty" (Rec., p. 103). Thus would the whole agreement have been made effective. And it was because those accountants failed to perform this plain and simple duty that the Cherokees lost the right under that agreement to have the precise question that is now before this court decided by the Court of Claims in 1895 instead of ten years later. To that extent the Cherokee Nation has undoubtedly suffered through the fault of these agents of the United States and through the equally unauthorized ratification of their report by the Secretary of the Interior, if his transmission of the account to Congress is to be so construed. But the blame can be extended no further; for when this remarkable

accounting, big with its "conclusions of law," reached Congress that body immediately asked the opinion of the Attorney-General respecting those conclusions of law, and the Attorney-General at the first opportunity advised Congress that the conclusion of law in the report as to the item of the cost of removal was erroneous. By this time, however, the twelve months within which the Cherokee Nation had the right to contest the account had lapsed, and thus the agreement for the accounting had in effect been rendered a nullity.

The question of estoppel.

In view of the foregoing facts it is difficult to perceive the merit of the contention that the United States is estopped from disputing the binding force of the Slade and Bender account because the Cherokees lost their right to sue the United States under the agreement of 1893, in a suit expressly authorized by the United States to restore that right.

Further consideration of the various opinions delivered in the court below on this subject.

"The one thing that is certainly assured to the nation [through the agreement for an account], and the only thing, is that the account will be the portal through which the Cherokee Nation can carry the rights and the wrongs of its people into a judicial forum." (Opinion of the Court, Rec., p. 47.) If this accurately states the situation, then it follows that there was no agreement that the account should be

stated according to the theory of the Cherokees, for the account could only be the portal through which the Cherokee Nation could enter court, by being stated as it appeared on the books of the United States—that is to say, contrary to the theory of the Cherokee Nation. True, the court goes on to say that the Cherokee Nation must then come into court only to be immediately turned out under previous decisions (Rec., p. 50). If this is so it is because such is the law of the case, because the treaties under which it is asserted do not support the claim. But after all, even though the agreement for an accounting be deemed to carry with it no other assurance than that the Indians were to have their legal rights upon the question of the cost of removal under the treaties of 1835 and 1846 judicially and finally determined in the Court of Claims and this court, nevertheless the agreement is not therefore necessarily a vain thing, for the question had not as yet been judicially determined in a suit wherein the Eastern Cherokees were a party, and hence was not as to them *res adjudicata*. Moreover, the very question is now an open one before this court, with the opinion of one of the judges of the Court of Claims in favor of the contention of the Cherokees. Then, too, it is asserted in the opinion of the court that under the agreement, if this claim had come before the Court of Claims in 1895, the court would have been warranted in disregarding the strict law of the case (rec., p. 49). Indeed, two members of the court

have done precisely that in the present case. Thus from every point of view it would seem that it was left to the Court of Claims and to this court to decide whether or not this claim of the Cherokees should be tested as other claims against the United States are judicially determined—according to the law of the case, and that no such unusual equity jurisdiction was conferred by the agreement upon two lay accountants. All that can be said in favor of the Slade and Bender account is that no mistake was made by the accountants upon the legal theory which they adopted as the basis of the liability of the defendants. (Opinion of Weldon, J., p. 59.) But the United States objects, not to the mathematics of the Slade and Bender account, but to its usurpation of judicial functions.

In the same opinion the United States is held accountable for the failure of the Secretary of the Interior to express the dissatisfaction of the United States with the Slade and Bender report (rec., p. 60). There is, however, nothing in the agreement of the treaty under which these accountants were appointed clothing the Secretary of the Interior with any such authority in the premises. The authority to act upon the report rested under that agreement with Congress alone, and the only relation to it of the Secretary of the Interior was a purely ministerial one.

DISSENTING OPINION OF JUDGE WRIGHT.

The various arguments made in support of the Slade and Bender account are briefly but thoroughly

disposed of in the following quotations from the dissenting opinion of Wright, J.:

> It is not strictly accurate to say that the $1,111,284.70 of the Slade and Bender account is part consideration for the sale of the Outlet, for that item had no existence until Slade and Bender made an account that was never in the records.
>
> The stipulation relative to the existing dispute about the subject of removals was part of the agreement for such sale, and to that extent may be treated as entering into the inducement or consideration for such sale, but the rights of the parties created by the contract could not be enlarged nor abridged without the consent of both, by the agents of either while assuming to carry out the provisions of the agreement.
>
> All that was contemplated by the fourth subdivision of article 2 of the agreement of December 19, 1891, was a statement of the account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868, and any laws passed by the Congress for the purpose of carrying said treaties, or any of them, into effect. Upon such accounting being made the Cherokee Nation was given the right within twelve months to enter suit in this court, not for any moneys appearing to be due upon the accounting, but for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation under any of the treaties or laws which

might be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; or, if it should be found upon said accounting that any sum of money had been so withheld, the amount should be duly appropriated by Congress.

What manifestly was intended by the agreement was that the United States was to state, first, the moneys due to the Cherokee Nation under the treaties specified and the laws passed to carry them into effect, and, second, the disposition in fact made of such moneys—not what ought to have been done, but what was done. In other words, the account should state the various sums so appropriated, so that it would appear in a precise and compact form how much money was due the Cherokee Nation under the treaties and laws mentioned and the disbursements thereof in fact made by the United States.

This was the view taken by the Interior Department, before Congress ratified the treaty, in the report of the Commissioner of Indian Affairs, communicated to Congress, and upon which was made the appropriation of March, 1893, of $5,000 to employ such expert persons to properly render a complete account to the Cherokee Nation of moneys due, as required in the fourth subdivision of article 2 of the agreement. The report upon which the Congress acted in making such appropriation in effect stated that it seemed the intention of the parties to the agreement that what was required was a detailed statement of all the moneys received and disbursements made by the United States

of the Cherokee funds under treaties and acts of Congress, and that being true it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century, and to prepare a statement of that kind it would require an appropriation of at least $5,000 to pay for the services of an expert accountant and assistants, and in the draft of the bill for the ratification of the agreement for the purchase of the Outlet the appropriation was provided for as recommended, thus proving by the act of ratification itself that Congress intended to require in such accounting only "a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress." Nothing was intimated or stated that the accountants were authorized to do more than to review and copy the accounts and records running back nearly a century. No authority was given to change the accounts, but to copy them.

The defendants agreed to inform the Cherokee Nation how much money was due to them under the various treaties and laws, and how much, for what purpose, and in what manner it had been paid out, thus forming a basis for the nation to come into this court and bring suit, not merely for a sum or balance appearing to be due on the face of such account, but to dispute the account, allege and declare an amount of money promised and withheld, or, in other words, that the United States had diverted or

misappropriated an alleged amount, and upon such allegation this court was given jurisdiction to decide and give its judgment.

Slade and Bender, the accountants, mistook their authority, however, and usurped the jurisdiction conferred upon this court and decided the questions intended for this court. They did not merely state the facts of the account as they existed, but changed the facts and undertook to state the account as they thought it ought to have been made. Their account was not the account of the defendants but the account they believed the defendants should have made instead. They substituted a different account for the one they were authorized to state.

It has been argued that the Secretary of the Interior by transmitting the Slade and Bender account to the Cherokee Nation thereby ratified and gave it effect. This can not be, for the plain reason that he was not the agent of the United States for such a purpose. The only authority conferred upon that officer was to employ such expert person or persons to properly render a complete account as required in the fourth subdivision of article 2 of the agreement.

It ought to require no argument to prove that beyond a mere statement of the existence of the accounts as in fact kept by the Government, a true exhibit thereof, the accounting of Slade and Bender is of no effect whatever. By their attempt to enter upon the jurisdiction so manifestly intended for this court they misled the Cherokee Nation and thwarted the inten-

> tion of the parties to obtain an early adjudication of the matters now before the court. As soon as this report was called to the attention of Congress it was repudiated, and the matter was again referred to this court in the form now existing, and the case is wholly unaffected by the report of Slade and Bender, except in so far as it exhibits the true state of the account, the record of the facts and acts of the Government, as they actually occurred at the respective times of the various transactions.

CONCURRING OPINION OF JUDGE PEELE.

To the foregoing arguments against the binding force of the Slade and Bender account should be added the following extract from the concurring opinion of Peele, J.:

> What, then, was referred to the court for adjudication? It is conceded in the court's opinion that the amount found due has none of the elements of an award nor of an account stated, but that as the rendition of the account was made a part of the consideration for the sale of the Cherokee Outlet it is binding on the United States, and therefore the court can not go behind the account so rendered. That Congress did not take that view of the account is evident from their passage of the two acts conferring upon the court jurisdiction "to examine, consider, and adjudicate * * * any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States." The agreement of 1891, ratified by the Congress, respecting the

rendition of an account, is that "The United States shall, without delay, render to the Cherokee Nation * * * a complete account of moneys due the Cherokee Nation under any of the treaties" therein referred to, and if the Cherokee council should "determine that such accounting is incorrect or unjust," the Cherokee Nation should then have the right, within twelve months, to enter suit in the Court of Claims against the United States. This it did not do, but instead accepted the account and thereby waived its right to sue. But were the United States bound to accept the account, based as it was upon the *assumption* of their liability under the several treaties? I think not, for the reason that the questions of law involved were not submitted to the experts for their decision by the appropriation authorizing their appointment, nor will the language of the agreement made the basis thereof bear such construction. The accounting contemplated by the agreement and for which the experts were appointed was a statement of the account as it actually existed between the United States and the Cherokee Nation—that is to say, to properly state the several claims of the Cherokee Nation and the payments made thereon by the United States. This they did not do, but upon the *assumption* of the liability of the United States to pay the cost of removal, stated a different account and the result was the balance of $1,111,284.70 in favor of the Cherokee Nation, so that in my view of the case that question was left open by the experts for the court to

> deal with; but inasmuch as the Cherokee Nation accepted the account, though rendered upon the assumption of the liability of the United States, instead of bringing suit in the Court of Claims to have that question determined, it was left for the Congress to deal with, and hence the reference of the claim to this court. The jurisdiction of the court to determine that question is not controverted.

Finally, the language of the jurisdictional act under which this action was brought in the Court of Claims precludes any idea of a claim based upon the Slade and Bender report. It reads:

> Jurisdiction is hereby conferred upon the Court of Claims to *examine*, *consider*, and *adjudicate*, with the right of appeal to the Supreme Court of the United States, * * * any claim which the Cherokee tribe, or any band thereof, *arising under treaty stipulation*, may have against the United States.

Rightly interpreting the scope and purpose of this statute, Judge Peelle, instead of holding himself bound by the Slade and Bender report, made examination into the treaties and statutes discussed and interpreted in that report with a view to determining the claim as *arising under treaty stipulation*, and as a result decided that the conclusions of law in the Slade and Bender report were correct. Judge Wright, approaching the subject in the same way, reached the opposite conclusion.

THE TREATIES AND APPROPRIATION STATUTES OUT OF WHICH THE CLAIM HERE UNDER CONSIDERATION IS ALLEGED TO HAVE ARISEN.

THE TREATY OF NEW ECHOTA.

The treaty of New Echota was entered into on the 29th of December, 1835, but on March 1, 1836, five supplementary articles were added to it, and thereafter the treaty as thus completed was ratified and adopted as one instrument, on May 23, 1836. The claim which is the subject of this appeal had its origin in the apparent, though not necessarily actual, conflict between articles 8 and 15 of the treaty of 1835, in that, whilst article 8 recites that the United States agree and stipulate to remove the Cherokees to their new homes, section 15 provides for a distribution per capita amongst the Indians of the balance of the treaty fund after deducting the amount which should be actually expended for various enumerated items referred to in the preceding articles of the treaty, including removal.

It is impossible, of course, to reconcile these two articles on the theory of the claimants that by article 8 it was intended to provide that the United States should not only remove the Cherokees, but bear the cost of such removal; but upon the theory that by article 8 it was simply provided that the United States should supervise, and supply the means of, the removal by furnishing a sufficient number of steamboats and baggage wagons to remove the Indians comfortably, as specified in said article,

whilst by article 15 the cost of the same was to be borne by the Indians, the two articles become harmonious and effect is given to both. In any event if the two articles can not be reconciled, then, to quote the language of the opinion of Judge Peelle, "If the ordinary rules of construction applicable to contracts between individuals are enforced, it must be conceded that the cost of removal was properly chargeable to the treaty fund" (Rec., p. 63). That is to say, the fifteenth article, being the later one, must control. It must be conceded, however, that this apparent conflict between these two articles of the treaty gave color to the contention on the part of the Indians that the cost of removal had not been properly taken into consideration in fixing the treaty fund at $5,000,000, and that therefore further provision should be made for the same. A similar contention was also made by them respecting certain claims of individual Indians against citizens of the United States. This contention so impressed the President that before the treaty was completed he referred the same to the Senate, with the statement that since the Cherokee people had supposed that the sum of $5,000,000 fixed by the Senate in their resolution of the —— day of March, 1835, as the value of the Cherokee land and possessions east of the Mississippi River was not intended to include the amount which might be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, it was his desire that the

Senate consider the same, and if it was not intended by the Senate that this sum of $5,000,000 should include those objects, in that case such further provision should be made therefor as might appear to the Senate to be just.

At the same time there was pending before the Senate, by the provisions of article 1, the question as to whether the original treaty fund covered claims for spoliations, and it had also been determined by the President that no preemptions nor reservations should be allowed, as provided for in the treaty. The result of all this was the agreement to five supplementary articles to the treaty. The first article related to preemptions, rights, and reservations, declaring them void; the second article recited the question regarding claims and the cost of removal which had been referred to them by the President, and the third article made provision for all these items as follows:

> ARTICLE 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions and of the sum of three hundred thousand dollars for spoliations described in the first article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed

agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

Thereafter, as already stated, the original treaty, together with the supplementary articles, was ratified as one treaty, which treaty made full provision for the payment of every item to which the Indians were entitled and provided a treaty fund of $5,600,000 for that purpose. (27 C. Cl., pp. 40 and 43.) This treaty, so far as it defined the liability of the United States to the Indians for the cost of removal, spoliations, claims against the United States not otherwise provided for in the treaty, and in lieu of reservations and preemptions originally provided for in the treaty, bound the United States to pay to the Indians the sum of $600,000, to be applied to those purposes, the surplus, if any, to be turned over and belong to the education fund. On the other hand, it equally bound the Cherokees to accept that sum as the consideration for those items. This agreement no more bound the United States to pay any further sum for the purposes enumerated than the original treaty bound the United States to pay more than $5,000,000 for the purposes therein enumerated. It can no more be spelled out of the supplementary articles to the treaty that the United States was liable for a greater amount than $600,000 in the event that the total cost of removal, claims, spoliations, reservations, and preemptions enumer-

ated in article 3 should aggregate more than $600,000, than that they were obligated to pay more than $5,000,000 to the Indians, in case the aggregate of the cost of improvements, ferries, and subsistence, together with the $1,000,000 to be devoted to a permanent trust fund and to payment for additional land in the West, should exceed $5,000,000. And yet it is precisely upon this theory that this claim is asserted, the argument being that the effect of the supplementary articles 2 and 3 is an agreement upon the part of the United States to pay the total cost of removal, whatever it might be. But this necessarily rests upon pure inference, since the express language of those articles conveys no such meaning; yet nothing would have been easier than to recite such an obligation, if it had been so intended, by stating, in so many words, that the United States agrees to pay the whole expense of the removal of the Cherokee people; and the fact that the supplementary articles studiously refrained from any such recital is the strongest evidence that it was not so intended. The fact is that supplementary article 3 was, as it turned out, an agreement founded upon a mistaken idea of the situation. This is evident from the fact that it makes provision for the disposal of the *surplus* after applying the $600,000 to the cost of removal and to the payment of claims and for spoliations and in lieu of reservations and preemptions. It was an agreement, nevertheless, binding the United States to pay the $600,000 and the

Indians to accept the same for the purposes enumerated. But it is argued, on behalf of the claimant, and such is the view taken in the concurring opinion of Judge Peelle (Rec., p. 64), that the supplementary articles necessarily operated to modify article 15, by eliminating therefrom the word "removal," thereby harmonizing that article with article 8. But this by no means follows. To begin with, it is significant that the question before the Senate when the supplementary articles were agreed upon was not as to the meaning of the language of the treaty itself, but only as to whether the Senate intended in their resolution of March, 1835, to include in the sum of $5,000,000 the cost of removal of the Indians, and, as above pointed out, no reference is made in supplementary article 3 to the provisions of article 15 of the treaty. Hence that article remains in force. As a practical matter, to be sure, it was supposed that it would not be put in force as to the cost of removal, since it was supposed that supplementary article 3 made ample provision for that purpose. But the complete agreement on the subject of removal, of the treaty as finally ratified, was clearly this:

By article 16, that the Cherokees should remove to their new homes within two years from the ratification of the treaty. This, by the way, was the very essence of the whole treaty, the prime purpose of which was to rid the States wherein the Indians were then residing from their presence, troublesome and distracting to the whites and to themselves, and to provide them a suitable and permanent home in the

far West. By article 8 the United States were to supervise this removal and take care that it be done in a proper manner. By supplementary article 3 the cost of the removal was to be paid out of the fund of $600,000 therein provided for. And by article 15, left absolutely intact in the treaty, any further cost of removal over and above this $600,000 was to be deducted from the $5,000,000 fund.

Thus viewed, each and every one of the articles of the treaty above enumerated is made effectual according to its fair and reasonable intendment.

And in any event, if only the $600,000 fund was made available for the cost of removal and since by the treaty the Cherokees agreed unqualifiedly to remove, it is clear that they must pay the further cost of that removal after the only fund provided for the purpose by the treaty was exhausted.

THE ADDITIONAL APPROPRIATION OF 1838.

As the appropriation act of June 12, 1838, is relied upon as a legislative construction of the treaty of New Echota favorable to the contention of the claimants upon the question of cost of removal, a discussion of the same here becomes necessary. Notwithstanding the Indians were required by the provisions of article 16 of the treaty to remove within two years, only a small minority did so, but the cost of the removal and subsistence of that minority, together with the other expenditures chargeable thereto, nearly exhausted the $600,000 allowed by the third supplementary article. At this

juncture the Secretary of War recommended that the Cherokee Nation be allowed, as had been requested by it, to take charge of their own emigration, and that application for such further sum as might be required to defray the expense should be made to Congress. Thereupon the House of Representatives passed a resolution asking for a statement of the amount that would be required for this purpose, and on May 25, 1838, the Secretary of War submitted an estimate of what it would cost the United States to remove and subsist the Cherokees, as proposed. This estimate was as follows:

The payment of expenses of removing the remaining Cherokees, estimated at 15,840, at $30 a head	$475,200	
Amount applicable to that purpose	39,300	
Balance to be provided for		435,900
If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival in the West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated to be paid by treaty, namely, $33.33 a head		611,167
Total		1,047,067

(H. R. Ex. Doc. No. 182, Fifty-third Congress, third session, p. 10.)

On June 12, 1838, Congress appropriated the full amount thus estimated, as follows:

> SEC. 2. *Be it further enacted*, That the further sum of one million forty-seven thousand

> and sixty-seven dollars be appropriated, out of any money in the Treasury not otherwise appropriated, in full for all objects specified in the third article of the supplemental articles of the treaty of 1835 between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of said sum of money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty: *And provided further*, That said Indians shall receive no benefit from said appropriation unless they shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of the Government.

Much significance is sought to be attached to the above provision that no part of this appropriation was to be deducted from the $5,000,000 treaty fund, the argument of Judge Peelle in this connection being: "If not to be so deducted, then it certainly follows that the United States were to pay the cost of such removal and subsistence, not a part of it, but the whole of it."

On the contrary, it would seem impossible to make anything more of this appropriation than a gratuity, an act of grace on the part of the United States, done with a generosity which is fittingly dwelt upon in the case of the *Eastern Band of Cherokees* v. *The United*

States and the Cherokee Nation (20 C. Cls., 467), where the court say:

> To carry out that policy [of removal from the States] immense sums of money, millions of dollars not promised by treaties, have been appropriated by Congress, and paid in the spirit of unbounded liberality, yielding to the demands of the Indians in almost every case, perhaps in every case without exception, and paying in one way and another to an extent more than twice as much as they agreed to pay by the terms of treaties, as is shown by the numerous appropriation acts scattered throughout the Statutes at Large.

And as for the above proviso, it clearly meant nothing more than to give positive assurance that the appropriation was wholly additional to the $5,000,000 fund; and as a matter of fact, it has been so treated. But the act contains another clause which is of undoubted significance, namely, that the appropriation was to be "in full for all objects specified in the third supplemental article of the treaty of 1835," which include the cost of removal. The subsequent acceptance by the Cherokees of the benefits of this fund, with the condition above attached, ought alone to bar them from the assertion of any further claim upon the United States for the cost of their removal, and certainly from *basing* such claim upon this very act.

The views of the commissioners appointed by the President in July, 1846, to inquire into the difficulties then existing among the Cherokees and all

matters in dispute between them and the United States, which commissioners, under a subsequent appointment, negotiated the treaty of 1846, and whose report and conclusions in a great measure formed the basis of that treaty, are very pertinent here. They reported as follows:

> That nothing more was intended to be paid by the United States for the possessions of the Cherokees east of the Mississippi than the sum of $5,000,000 is rendered certain by the letter of General Cass, Secretary of War, dated March 7, 1835, in reply to the delegation headed by John Ross. That delegation, under date of March 6, 1835, inquire of General Cass "whether we are to understand from your communication of this date that the five millions resolved by the Senate should be paid to the Cherokee Indians for all their land and possessions east of the Mississippi River, as embracing also the expenses of transportation and subsistence in removal, and for subsistence for twelve months after their arrival at their new homes; for blankets, guns, etc., or whether that sum is an offer, as really appears from the resolution to be, only for the extinguishment of the Cherokee title to lands east of the Mississippi River, and for the houses and improvements of the Cherokee inhabitants situated thereon, and that the United States will in addition pay the expenses of transportation and subsistence in their removal," etc. To which General Cass replied that "the sum of $5,000,000 which is offered for your claims east of the Mississippi will, as

I have already informed you, *be in full for your entire cession.* The application of it will be such as you desire, a just regard being had to individual rights. *Nothing more will be paid for removal, or for any other purpose or object whatever.* In giving to you the full value of your property the United States comply with all the demands of justice upon them."

Thus, so far, there could be no misunderstanding as to the purposes of the United States in reference to the amount to be paid for the lands of the Cherokees east of the Mississippi nor as to the objects to which it was to be appropriated.

The talk sent by General Jackson to the Cherokee people, under date of March 16, 1835, takes the same view of the subject, and mentions generally the objects to which the money is appropriated. (See House Doc. 286, first session, Twenty-fourth Congress, pp. 41, 42, and 43.)

We have thus shown what was the understanding of the parties in reference to the matter prior to the treaty of 1835. We now come to the treaty, and we find the same understanding substantially recognized although varied in some not essential particulars. In the fifteenth article of that treaty it is expressly acknowledged and agreed that "the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, debts, and claims upon the Cherokee Nation, and for the additional quantity of lands [the 800,000 acres to be added to the country west

of the Mississippi] and goods for the poorer classes of Cherokees, and the several sums to be invested for the general national funds, provided for in the several articles of this treaty," shall be deducted from the purchase money, and the balance, whatever it may be, shall be divided equally between all the people belonging to the Cherokee Nation east, according to the census then just completed.

An additional sum of $600,000 was added to the $5,000,000 by the third supplemental article of the treaty; and the further sum of $1,047,067, appropriated by the act of June 12, 1838, for removals, subsistence, etc., as before stated, all which constituted one general sum of $6,647,067, upon which the sums expended for the objects recapitulated in the fifteenth article of the treaty were chargeable.

It is now argued by the counsel for the western portion of the Cherokee people, including the Ross and treaty parties, that inasmuch as the sum of $1,047,067, appropriated by the act of June 12, 1838, was given by Congress for removal and subsistence, the United States thereby assumed those two items of expenditure, and of course relieved the five million fund from any charge for those two objects.

To put an end forever to that argument, the undersigned copy from the report of Judge White, Senate document 466, second session, Twenty-fifth Congress, before referred to, the following extract:

"They believe the $5,000,000, given by the treaty, as the difference in value between

the countries exchanged, and the $600,000 before mentioned, allowed for spoliations, and as a fund for removal, constitute a very liberal consideration on the part of the Federal Government; yet the committee would feel much better satisfied that too much should be done for the Cherokees than too little. If, therefore, the voluntary grant of an additional sum of money can be made a means of *hastening* their removal to their new homes, of dispensing with the use of a large military force, and of insuring confidence in the justice of the Government, and of restoring harmony and good feelings, they believe economy, humanity, and peace will be best consulted by making such grant.

"With a view to attain these objects, the committee would respectfully recommend to the Senate that, in the passing of some appropriation bill still to be acted on, an item be inserted placing a reasonable sum of money at the disposal of the Executive."

Thus it appears that the large appropriation of $1,047,067 was a "*voluntary grant*," made for the purpose of hastening the removal of the Indians, of dispensing with the large military force employed in that country, and restoring harmony and good feelings between all parties, and not for the purpose contended for by the counsel.

The expenditures specified in the fifteenth article are, therefore, justly chargeable upon the treaty fund.

THE REMOVAL OF THE CHEROKEES FOLLOWING UPON THE APPROPRIATION ACT OF JUNE 12, 1838.

The following history of the removal of the Eastern Cherokees by the Cherokee Nation itself, through what is known as the *Ross contract*, is, despite its length, absolutely essential to a full understanding of the situation following upon the appropriation statute of June 12, 1838.

The Cherokee Indians having been collected into camps and contracts having been entered into with sundry firms for the subsistence and removal of the Indians to the West, General Scott, on July 23, 1838, was approached by a delegation of the Cherokee Nation, numbering eight and headed by John Ross, an influential member and principal chief of the tribe, bringing to General Scott a resolution which had been adopted by the national council of the Cherokees, which read as follows:

> *Resolved by the national committee in council of the people of the Cherokee Nation in general council assembled*, That it is the decided sense and desire of the general council that the whole business of the emigration of our people shall be undertaken by the nation, and that delegates are hereby advised to negotiate the necessary arrangements with the commanding general for that purpose.

A letter signed by these delegates informed General Scott that, pursuant to such resolutions, the Cherokee Nation was willing to undertake the whole business of removing the people of the tribe to the west of the Mississippi River. (Report No. 288, *supra*.) There-

upon, on July 25, 1838, General Scott replied, in substance, that on the part of the United States he was ready to place the whole business of completing the emigration of the Cherokee people to their new homes west of the Mississippi River in the hands of such functionaries of the Eastern Cherokees as should possess due authority to undertake and carry through the emigration. The letter concludes with the following sentence:

> The foregoing conditions being agreed to, the United States, through me, are willing to stipulate to pay over to the Cherokee functionaries, from time to time, such portion of the moneys appropriated for the emigration as may seem reasonable to prepare for and carry it out.

On July 27, 1838, the delegates notified General Scott by letter that they had full authority to close the necessary arrangements for the entire removal and subsistence of the Cherokees, and were prepared to do so. (Report No. 288, p. 6.)

On the 28th of July General Scott pronounced the credentials of the delegates satisfactory, and authorized them to take charge of the business and to make estimates of necessary expenses, and agreed to honor such estimates, if reasonable.

On the 31st of July the Cherokee delegates submitted an estimate of expenses, which amounted to $65.88 *per capita*.

On August 1, 1838, General Scott wrote to the delegates that their estimate was extravagant, and

discussed the matter at some length. In conclusion he stated:

> The whole expense of the emigration is to be paid out of the appropriations already made by Congress, the general surplus of which is to go to the Cherokee Nation in various forms. Therefore they have a direct general interest in conducting the removal as economically as comfort will permit.

On August 2, 1838, the delegates addressed General Scott, adhering to their estimates, with a slight increase for soap. On the same day General Scott wrote to the delegates, yielding to their estimates and demands, and again admonishing the Cherokee Nation in the following language:

> As the Cherokee people are exclusively interested in the cost as well as the comfort of the removal, I do not feel myself at liberty to withhold my sanction. The estimate, therefore, submitted to me on the 31st ultimo, with a small addition for soap, is hereby approved.

This increase brought the proposed cost of removal up to $66.24 per capita. (Rep. No. 288, p. 2.)

General Scott entered into these negotiations by express instructions from the Secretary of War, who, by letter, authorized him to enter into an agreement with the agents of the nation for the removal of their people, etc. It will thus be seen that there was a deliberate contract entered into between the Cherokee Nation, acting through its

appointed delegates, and the United States, acting through its appointed agent, for the removal of these Cherokees, and that in the contract thus made the Cherokees were distinctly informed that the cost of such removal was to be charged to the Indians and deducted from their funds. There can be no doubt that the Cherokees understood this fact, and entered into the agreement with the full knowledge that the cost of removal was to be borne by them and not by the United States.

Take, for instance, the memorial or protest of a large committee of Cherokees against awarding this contract to John Ross. This protest is dated August 20, 1838, and is contained in Report No. 1098, Twenty-seventh Congress, second session, pages 31–36. Extracts from this protest are as follows:

> Among the arguments, as we learn, which Mr. Ross used to shew the propriety of investing him with absolute power, he insisted that the late contract promoted a large individual speculation: that, under his guidance, he would save in the expenditures for supplies at least one hundred thousand dollars *to the nation*. Instead of this, we think his present contract has added largely to the expense to be incurred, etc. * * *
>
> We contend that the contract ought to have been let out to the lowest bidder; that the nation, as well as those who have already emigrated as those who are present, are under the protection of a solemn treaty

against every abuse of power, and that that protection is wisely confided to the United States; that although the chief representation of the power of the United States may have deemed it fit and proper and most expedient to confer certain powers upon Mr. John Ross, yet that *no abuse and improper expenditure of the money belonging to the nation* can justly be permitted to be made by Mr. Ross in violation of the treaty. * * * Hence, the duty of protection on the part of the United States is of a twofold character—that the objects designed may be attained by the Government, and that the Cherokees may have full justice done to them, and the *largest possible sum saved for their use and benefit*.

Again, on page 33, the memorialists say:

Against the contract, therefore, which Mr. John Ross has made, which is at variance with all his professions and deeply injurious to the nation, and against the mode in which it was made, for the supply of the Indians on their route to Arkansas, we, the undersigned committee of the Cherokee Nation, duly recognized under the treaty, which is the supreme law of the land, do enter our solemn protest; "and we do appeal to you, as the official organ of the United States, for the immediate redress of this great and grievous wrong." We insist, as of right, that the contract should be let out by public advertisement, by the proper disbursing officer of the United States, to the lowest bidder at as

> short notice as you may deem expedient. We pledge ourselves that there are individuals now upon this ground, of the first respectability in point of character and property, who will take the contract at a much less sum, and by which one hundred thousand dollars will be saved to the Cherokee Nation. And we also pledge ourselves that they will be forthwith prepared with supplies, without the delay of a single day.

Again, on page 35:

> If we now made an appeal to you for anything in favor of ourselves, personally, as an exclusive privilege, we should expect rejection. But we make an appeal against a stupendous individual speculation upon the funds of the nation, and we appeal to you for a voluntary right of emigration, upon equal terms with all other modes, and as the official power of the nation, recognized by the treaty and by the Government of the United States. We now repeat our solemn protest against the existing contract by Mr. Ross with his brother as a wanton expenditure of the money of our nation.

From this protest it is plain that the Cherokee people fully realized that the amount paid for their removal was to be charged to them, and hence were interested in having it done as economically as possible. General Scott transmitted this protest to the delegates with whom he had made the contract, and speaks of it as involving perhaps $400,000 of the money of the Chero-

kees, and in concluding his letter he says, in substance, that it is inconceivable that the delegates of the Cherokee Nation had deliberately squandered $180,000 of their nation's money. (Pp. 37–38.)

When Ross presented his bill for $486,939.50, in addition to the $776,398.98 that had previously been paid him for the removal expenses, the bill was authorized to be collected by the Cherokee Nation for the benefit of the Cherokee Nation, and to that end the Cherokee Nation employed counsel to press the claim and collect it. This gentleman's name was M. St. Clair Clarke, and with the permission of the Secretary of War he addressed certain interrogatories to General Scott, one of which was as follows:

> Interrogatory VIII. Did you or not at any time understand from John Ross and others that there was to be a settlement by the emigrating committee and the nation, and that the *actual cost of emigration was to be the cost charged to the nation?*

To this interrogatory General Scott answers:

> I did.
>
> (Rep. No. 288, pp. 33–35.)

General Scott further states (p. 38):

> Under this head I must say that the understanding of the parties was common and distinct, that the eighty days for the movement of each detachment by land was a mere assumption of a basis on which to calculate for the moment the advances to be

made by the United States on account of the movement, and to set it a going. If the advances proved to be too great, the excess was to be paid into the treasury of the nation; if too little, on account of more time in the movement, the United States were to *make up the difference from the trust fund.* This understanding is distinctly stated in my letter to J. Ross, November 14, 1838. Until late in the season it was not doubted that the detachments, one with another, would make the movement in the time estimated—eighty days. * * *

I know not how to account for the fact that so many doubtful and extravagant charges should be made by the Rosses against the *funds of their nation*, unless it be to augment the profits of Lewis, and perhaps of John; or perhaps, again, to increase (by disgorging) the *per capita* of *their party, to the prejudice of the treaty party* of the same nation.

Whether those party dissensions have been healed, and the signers and friends of the treaty are now fully represented in the national council, I know not, having no information from that people in the last three years. I observe, however, among the papers before me, belonging to the War Department, one that purports to be a copy of a long preamble, with resolutions annexed, passed by the two branches of the Cherokee national council, which audits and sustains, in the fullest manner, the two items above, and to the precise aggregate amount claimed, $581,346.88½.

If this document be genuine, and has emanated from the government of the nation, it would seem to be a sufficient voucher on which to make the payment. Whether the minority or treaty-making party, whose *per capita* may be materially lessened by the excess of the charges, have consented to those resolutions, I know not.

When this claim was considered by the Secretary of War, he said (pp. 27, 28, and 29):

A claim was preferred by the representatives of the Cherokee people, to whom had been intrusted the direction of their removal to the west, under an arrangement with Maj. Gen. Winfield Scott, in the summer of 1838. * * *

The sum now demanded amounts to $486,939.50. *It is alleged to be payable out of the balance of the Cherokee fund created by the treaty of 1835 and the law of 1838*, to the representative or agent of the Cherokee people, in trust for such of them as have rendered services or furnished means of transportation or subsistence to those who removed, under the direction of their chief, John Ross, in 1838 and 1839. The construction which has heretofore prevailed limited the time (for the purpose of settling the compensation) within which the emigration was to be performed to eighty days, and the sum to be paid to $65.88 for each individual removed. This, it was conceived, was deducible from the correspondence between Gen. W. Scott and the Cherokee del-

egation in 1838, whose arrangements, by letter, were considered to be a contract for a specific sum, at which Mr. Ross and his associates were bound to remove their brethren to the western territory. The claimants, on the other hand, contend that the estimate, which was finally acceded to by General Scott in August, 1838, was nothing more than an exhibit of the daily cost of transporting and subsisting each individual, which was regarded as fixed; but that the time assumed in the estimate was not binding on either party, but was to be subsequently ascertained by actual experiments, and the measure of compensation to be settled in the particular of time by the fact, as it should turn out, whether the number of days consumed in the emigration should be more or fewer than eighty. * * *

I think the ground on which the claim rests is materially varied by the recent statement of General Scott. Since the first decision was made, General Scott, in his answers to Mr. Clarke's interrogatories, states: "The march of the several Indian detachments was averaged, by estimate, at eighty days; and on that estimate, money was *advanced* to Mr. John Ross. If that estimate was found too great, Mr. Ross *was to refund to the nation;* and if too small, including the unavoidable delays mentioned above, it was understood and agreed that the subsistence, etc., for the excess of time on the road, was to be paid for by the Government *out of the funds of the Cherokees.*" And again: "The

time of the actual removal (the commencement) on this side of the Mississippi of each detachment was to be marked by Captain Page, and the arrival of the detachment on the other side of the Mississippi by Government agents there. Of course the final settlement of the expenses of the removal was left for its termination." In the "notes" submitted by General Scott, in June last, he is perhaps stronger to the same effect: "*The understanding of the parties was common* and distinct, that the eighty days allowed for the removal of each detachment, by land, was a mere assumption of a basis on which to calculate, for the moment, the advances to be made by the United States on account of the movement, and to set it agoing. *If the advances proved to be too great, the excess was to be paid into the treasury of the nation; if too little, on account of more time in the movement, the United States were to make up the difference from the trust fund.*"

The Secretary of War then quotes the authorization of the Cherokee Nation to John Ross to collect this money as follows:

In addition: "The Cherokee Nation, through their national committee and council, in national council assembled," ordered, "That the aforesaid John Ross be, and he is hereby, directed and fully empowered to proceed to Washington City, and to urge a settlement of this claim with all possible expedition, and to apply for and receive from the Government of the United States, *in the*

> *name of the Cherokee Nation*, the balance due of five hundred and eighty-one thousand three hundred and forty-six dollars and eighty-eight and one-half cents, as stated in his account of the emigration claim, in order that the business growing out of it may be brought to a final close." * * *
>
> The strongest argument that can be urged in its favor, and the one that chiefly influences my mind, is the resolution of the Cherokee council of November 11, 1840. It has been their pleasure, in the most solemn form in which their legislative power can be exercised, to say what disposition shall be made of this *their own money;* and I know of no objection to the allowance of what they have thus sanctioned.

It was therefore paid to John Ross, at the order of the Cherokee Nation, as a part of the funds of the Cherokee Nation, and if the authorities of the United States had had the remotest idea that the sum so paid was to be borne by the United States and not by the Indian fund, it is safe to assert that no payment would ever have been made.

The evidence is abundant to warrant the oft-repeated protest of General Scott that $66.24 *per capita* was a most extravagant estimate for the removal of these Cherokees. Section 8 of the treaty of 1835 fixed the cost at $20 per head, and that was the amount allowed to the two thousand and odd Cherokees who voluntarily removed. The estimate on which the act of June 12, 1838,

appropriating $1,047,067 was based, was $30 *per capita*. J. C. Watson & Co., in the spring of 1838, offered to contract at $32 *per capita*. Gerry Hinant stated before the Congressional committee, who investigated this matter, that he was a citizen of the Cherokee Nation, and removed himself; that he was fifty-five days on the route; that he moved at his ease, stopping when necessary for rest and refreshment; and that his expenses, after starting, were less than $20 per head. The distance was 800 miles. (Rep. No. 288, p. 1.)

In the protest of a large number of Cherokee people, the following statement occurs:

> We pledge ourselves that there are individuals now upon this ground, of the first respectability in point of character and property, who will take the contract at a much less sum, and by which $100,000 will be saved to the Cherokee Nation. And we also pledge ourselves that they will be forthwith prepared with supplies without delay of a single day. (Report No. 1098, Twenty-seventh Congress, second session, pp. 31-36.)

In addition to the foregoing, the following observations upon the John Ross contract seem pertinent and fully justified by the facts:

At the time that the proposition to remove the Eastern Cherokees was made by John Ross on behalf of the Cherokee Nation they had notice that the amount available for that purpose, which was composed of the balance left of the $600,000 appropri-

ation and the additional amount appropriated for removal in the appropriation act of June 12, 1838, was $475,200, while the estimated number of remaining Cherokees to be removed was 15,840 (R., p. 19). The price per capita for removal under the Ross proposition was $66.24 (Rep. No. 288, p. 2). Hence the proposition contemplated the expenditure of $1,049,200, in round numbers, for removal, or $575,000 more than the amount available for the purposes of removal outside of the $5,000,000 fund. Now, when it is considered in addition, that before the proposition was accepted General Scott distinctly admonished the delegates of the Cherokee Nation presenting the proposition that the Cherokee people were exclusively interested in the cost of removal and that they had a direct general interest in conducting the removal as economically as comfort would permit, it seems too clear for argument that the Cherokees understood at the time that the cost of removal would necessarily trench upon the $5,000,000 fund; and it is equally clear that it was only because of this clear understanding on the part of the Cherokees that the Secretary of War, through General Scott, consented to a proposition which in any other view of the situation would, on the face of it, result in a cost to the United States of over half a million dollars.

Indeed it is simply incredible that the Secretary of War, having at his disposal through the appropriation act of June 12, 1838, the full amount of

his own estimate of the cost of removal of the remaining Cherokees, would have approved the proposition of the Cherokee Nation to effect the removal at a cost of more than twice that sum, if the intent of that proposition had been that the United States were to bear the extra cost of removal thus proposed. In other words, that he would deliberately agree to involve the United States in a proposed expenditure of $575,000 by consenting to a contract for the removal of the Indians at a price $36.24 per capita more than his own estimate of the proper cost of the same, and without any attempt to test the accuracy of that estimate by resorting to other contractors. Indeed the corroboration of the substantial correctness of the estimate of the Secretary of War was then before him in the offer of Watson and Company to effect the removal at $32 per head. The only reasonable explanation of the acceptance by the Secretary of War of the Ross proposition is that it was with the distinct understanding that the extra cost of removal thus incurred should be borne by the Cherokee Nation. While the explanation of the willingness of the Cherokees to incur such extra cost is to be found in the fact that by directing their own removal they could do so according to their own ideas, and in the further very significant fact that the whole sum paid for the cost of removal would thus go to themselves.

The treaty of 1846.

After the removal of the Eastern Cherokees had begun, but before their arrival in the Indian Territory, they adopted a declaration of rights through their national committee and council and people in general council assembled, in which they declared the inherent sovereignty of the Cherokee Nation, together with the constitution, laws, and usages of the same, to be in full force and virtue, and should continue in perpetuity. Upon their arrival in the Indian Territory they refused to submit to the government of the Western Cherokees, but at the same time offered to unite in a general council or convention which should frame a constitution and establish a government for all. The Western Cherokees refused to enter into this arrangement and declared and maintained that the Eastern Cherokees had entered their territory without their permission, and that their status or character was that of immigrants or aliens, subject to the established constitution and laws then and theretofore existing in the Territory. The Eastern Cherokees refused to concede this and retained their autonomy, and made laws and exercised all the powers and functions of government. They likewise treated the act of signing the treaty of 1835 and 1836 by individual Cherokees as a treasonable act to the Cherokees, and they enacted decrees of outlawry against the Eastern Cherokees

who had signed the treaties and enforced these decrees. They also maintained their authority throughout the Cherokee country by military force, both against the members of the treaty party and all the Western Cherokees who did not submit to and recognize their government. The consequence was that between the years 1836 and 1846 the Cherokee country was the scene of disorders of the gravest character, destroying the rights and liberty of the people and endangering the peace of the frontier. The Western Cherokees appealed at different times both to the President and to Congress for help and protection and the recognition of their rights under the treaties of 1828 and 1833, and they duly and at all times declared and maintained that they were the true and exclusive owners of the land ceded by these treaties, and their government the only government *de jure* in the Cherokee country, and that it should be recognized by the United States.

Under these conditions the United States treated with the Eastern Cherokees, the Western Cherokees, and that portion of the Eastern Cherokees known as the treaty party, on August 6, 1846 (9 Stats., 871). In the preamble of this treaty it is declared:

> Whereas serious difficulties have for a considerable time past existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be

> speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people against the United States: Therefore, with a view to the final and amicable settlement of the claims before mentioned, it is mutually agreed by the several parties to this convention as follows:

The first article provides that the lands occupied by the Cherokee Nation shall be secured to the whole people and a patent shall be issued to them by the United States.

The second article adjusts all difficulties in dispute and declares for a general amnesty to be issued, etc.

The third article provides that the Cherokees shall be reimbursed for certain charges which have been made by the United States improperly against the treaty fund of $5,000,000.

The fourth article provides for the equitable interests of the Western Cherokees in the lands ceded by the treaty of 1828, and how the value of the said interest shall be ascertained, as follows:

> Now, in order to ascertain the value of that interest it is agreed that the following principle shall be adopted, viz, of the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to $5,600,000 (which investments and expenditures are enumerated in the fifteenth

article of the treaty of 1855), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would under such marshaling of accounts be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (the Western Cherokees) a sum equal to one-third part of such residuum to be distributed per capita to each individual to such part of the Old Settlers or Western Cherokees. It is further agreed that so far as the Western Cherokees are concerned in assessing the expense of removal and subsistence of the Eastern Cherokees to be charged to the aggregate fund of $5,600,000, above mentioned, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835, as commutation money in those cases in which the members entitled to it removed themselves, shall be adopted.

That is to say, the sums of $20 and $33.33 per capita.

By the ninth article of this treaty the United States agrees to make a fair and just settlement of all moneys due to the Cherokee Nation under the treaty of 1835, "which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, etc."

The eleventh article of this treaty provides for the submission to the United States Senate of the question of whether the amount expended by the United States for one year's subsistence of the Eastern Cherokees after their removal to the Indian Territory should be borne by the Indians and charged to the treaty fund. In pursuance of this submission to the Senate, the Senate decided that such cost should not be borne by the Indians or charged to the treaty fund, and the amount thereof was reimbursed to the Indians.

It was also proposed in the twelfth article of the treaty to likewise submit to the decision of the Senate the question of whether the expense of the removal of the Eastern Cherokees was to be borne by the Government or by the Indians, but this article of the treaty was rejected by the United States.

This treaty of 1846, entered into for the deliberate purpose of making all of the Cherokees parties to the treaty of 1835, which up to that time had been repudiated by a large majority of the Cherokees as binding only upon the minority by whom it was negotiated, called the "treaty party," and to amicably and finally settle certain claims of the Cherokee Nation and portions of the Cherokee people against the United States, would seem to have deliberately set at rest all possible question regarding the present claim of the Cherokees. And this obvious construction of the treaty

becomes more evident upon close examination. For instance, article 3 deals directly with the question of claims of the Cherokees, recited in the preamble, specifies certain such claims as just, being founded upon improper charges against the $5,000,000 fund, and proceeds to make provision for their reimbursement by the United States. No claim for cost of removal is referred to in this article, and upon familiar principles of construction, this enumeration is by exclusion alone sufficient to dispose of this claim. But again, by article 11, two open questions not determined by the treaty are left to the United States Senate for its decision. The first of these is whether the amount expended for the one year's subsistence of the Eastern Cherokees after their arrival in the West was properly chargeable to the treaty fund; and the other is whether the Cherokee Nation should be allowed interest on whatever sum might be found due the Nation (on the settlement provided for in article 9) and from what date and at what rate per annum. Here the exclusion of the question of the cost of removal is still more deliberate, for the items of removal and subsistence are coupled together in article 8 and article 15 of the treaty, being thus clearly placed upon the same footing, and yet by article 11 of the treaty of 1846 we find question raised in the treaty only as to the cost of subsistence. The irresistible conclusion is that the question of the cost of

removal was deemed at rest. This conclusion finds the plainest confirmation in the action taken with reference to the proposed article 12. This proposed article recited that the Western Cherokees asserted that the expenses incurred for removal and subsistence of the Cherokees after May 23, 1838, should not be charged upon the $5,000,000 fund, nor upon the fund provided by the third article of the supplement thereto, in the settlement provided for them in the treaty of 1846, and therefore they propose "that the question shall be submitted with this treaty to the decision of the Senate of the United States, of what portion, if any, of the expenditures made for removal, subsistence, and spoliations, under the treaty of 1835 is properly and legally chargeable to the five-million fund." This article was struck out by the Senate. And the treaty with this proposed article thus eliminated was ratified without dissent by the Cherokees.

Here, then, we find that during the negotiation of the treaty of 1846 the assertion that no part of the cost of removal should be charged to the $5,000,000 treaty fund was made by the western Cherokees alone, and that the Senate refused to entertain the general question of the cost of removal in any form.

Finally, we have a practical repetition in article 9 of this treaty of the provisions of article 15 of the treaty of New Echota, by providing

for a settlement with the Cherokees in order to ascertain the per capita division to be made pursuant to the treaty of 1835, which per capita division finds mention only in article 15 of that treaty. To this end it provides for a deduction from the grand total of the original $5,000,000 fund, the $600,000 added thereto by the third supplementary article, and the additional amount of $1,047,067 appropriated in 1838—$6,647,067—of the expenditures for practically the same items respecting which similar provision is made in said article 15. This enumeration includes removal. Article 4 also refers explicitly to this enumeration of the same article 15.

Thus we see that not only is the claim for the cost of removal omitted entirely from a treaty entered into for the express purpose of disposing of *all of the claims* of the Cherokees against the United States, but that the Senate refused to permit the question to be raised at all, and that express provision is made for charging the cost of removal against the total of the fund belonging to the Cherokees. This seems to leave no room for discussion, yet counsel for claimants profess to see a floating straw which they may grasp, by urging that this enumeration in article 9 of the charges to be made against the funds of the Cherokees is qualified with portentous significance by the preceding recital that "said settlement shall exhibit all money properly expended under said treaty"

(of 1835). Upon this word *properly* there is balanced the argument that the proper application of the word limits the charge of the cost of removal to the $1,647,067 provided for by the 3d supplementary article of the treaty of New Echota, and the appropriation act of 1838. But this is a mere begging of the question. Certainly the article recognizes by its enumeration that the cost of removal is one of the proper charges comprised in the preceding general phrase, and this without qualification; whilst, instead of providing that various charges are to be subtracted from separate funds, as, for instance, the cost of spoliations from the $600,000 fund, it is directed that the total of the expenditures shall be taken from the total of the funds. Of course there might be other charges not included in the enumeration which would be proper charges, but that would have to be clearly shown in making the settlement. One charge that was determined by the Court of Claims and this court in the Old Settlers case to be an *improper* charge was the expenses of the Cherokee committee. (148 U. S., 478.)

SUBSISTENCE AND REMOVAL.

It is urged that "subsistence" and "removal" should stand upon the same footing, and that the decision of the Senate upon the subject of subsistence ought also to control as to removal. This contention would seem to be completely disposed of by the action of the Senate in considering a

claim for subsistence in Article 11 and utterly refusing to consider any claim for removal by striking out Article 12. If any further proof were needed that the two claims do not stand upon the same footing, it is to be found in the action of the committee having under consideration the proposition to make a further appropriation for subsistence under Article 11 of the treaty of 1846, which was as follows, as is recited by this court of the United States in the case of *United States* v. *Old Settlers* (148 U. S., at p. 452):

> The committee gave their reasons for the first resolution at length. They stated that they entertained no doubt but that by a strict construction of the treaty of 1835 the expense of a year's subsistence of the Indians after their removal west was a proper charge upon the treaty fund, but they set forth a variety of considerations which justified the conclusion that the expense for subsistence was to be borne by the United States, including certain action by the Secretary of War in 1838, and the language of the act of June 12, 1838, making the appropriation of $1,047,067. By the latter, Congress provided that no part of the $600,000, or of the $1,047,067, should be taken from the treaty fund. The $1,047,067 was, said the committee, "made auxiliary to the $600,000 provided for in the third supplemental article—a fund provided for removal and other expenditures independent of the treaty, and in full for these objects. But as respects *subsistence* it was *in aid* of the *expense*

for that purpose, a discharge *pro tanto* of the obligation of the Government to subsist them, and *not final satisfaction as in the case of removal.*

Thus it will be seen that the action of the Senate in deciding that the expense for subsistence was to be borne by the United States was partly inspired by generosity toward the Indians, but in no sense resulted because the United States was bound thereto by the treaty of 1835. In other words, it was a concession made because of the plain exigencies of the situation; for by this time the cost of removal to be borne by the Indians had proven to be a burden too heavy to admit of any further additions to it for the cost of subsistence. As a matter of fact, the cost of both removal and subsistence had turned out to be enormously greater than estimated, the cost of subsistence being $1,457,000, and of removal $1,495,000, in round numbers. Both these expenses were strictly chargeable to the Cherokees, but the United States generously assumed the cost of subsistence.

THE SETTLEMENTS PROVIDED FOR IN ARTICLES 4 AND 9 OF THE TREATY OF 1846.

In 1850 the accounting officers of the United States appointed for the purpose prepared for settlement the account with the Western Cherokees provided for in article 4 of the treaty of 1846. In obedience to the provisions of article 4 the

computation of the cost of removal and subsistence was made on the basis of $20 per head for removal and $33.33⅓ per head for subsistence, amounting to $961,386.66, and the fund from which the total of the various expenditures was deducted was, pursuant to the same article, $5,600,000. This basis of computation left a residuum contemplated by the same article of $1,571,346.55, and in further compliance with said article the share belonging to the Western Cherokees was computed at an amount equal to one-third of this balance, or $523,148.85. Thereafter the account for settlement with the Cherokee Nation provided for in article 9 of the treaty was prepared by the same accounting officers. In preparing this account these accountants, pursuant to said article 9, charged to the grand total of $6,647,067 specified in that article for removal and subsistence the sum of $2,823,192.93, but this was partially offset by an appropriation made September 30, 1850, of $189,151.24 for subsistence, pursuant to the resolution of the Senate acting as umpire under article 11 of the treaty of 1846, on September 5, 1850, that the Cherokee Nation were entitled to this sum as an excess of the cost of subsistence improperly charged to the treaty fund.

Thus computed, the balance for distribution to the Eastern Cherokees was found to be $914,026.13. Appropriations were made by Congress to pay the amounts thus found due, with interest at 5 per cent per annum from June 12, 1838, pursuant to

the resolution of the Senate of September 5, 1850—for the Western Cherokees by the act of September 30, 1850 (9 Stat. L., 523–556); and for the Cherokee Nation, to be paid to the Eastern Cherokees, by the act of February 27, 1851 (9 Stat. L., 570–572).

The first statute contained the provision—

> That the Indians who shall receive the said money shall first respectively sign a receipt or release acknowledging the same to be in full of all demands under the fourth article of the said treaty.

The later statute contained the provision:

> That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation, and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees: *And provided further*, That the money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of sixth August, eighteen hundred and forty-six.

Prior to the payment of the sums thus appropriated by them, the Western Cherokees and the Cherokee Nation protested against these settlements as insufficient; the Western Cherokees chiefly on the ground that they had been charged with the cost of subsistence contrary to the resolution of the Senate above referred to. One of the grounds of the protest of the Cherokee Nation was that the treaty fund of $5,000,000 had been charged with a part of the cost of removal—the same claim that is asserted in this action. Subsequently, in 1852, the distribution of the amounts appropriated by Congress to pay the sums found due in these accounts was made per capita among the Western and Eastern Cherokees, respectively, and receipts were given by the Indians for the same as follows:

By the Eastern Cherokees:

> We, the undersigned emigrant or Eastern Cherokees, do hereby acknowledge to have received from John Drennan, Superintendent Indian Affairs, the sums opposite our names, respectively, being in full of all demands under the treaty of sixth of August, eighteen hundred and forty-six, according to the principles established in the ninth article thereof, and appropriated by Congress per act 30th of September, 1850, and per act 27th of February, 1851, which reads as follows:
>
> "And the said Cherokee Nation shall, on the payment of said sum of money, execute

and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by treaty to pay to said Cherokee Nation, and except also such money and lands, if any, as the United States may hold in trust for said Cherokees."

By the Western Cherokees:

> We, the undersigned "old settlers" or Western Cherokees, do hereby acknowledge to have received from John Drennan, Supt. of Indian Affairs, the sum set opposite our names, respectively, being in full of all demands under the provisions of the treaty of the sixth of August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, as per act entitled: "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30th, one thousand eight hundred and fifty-one," approved September 30th, 1850.

At the time of this distribution and the giving of these receipts no protest of any sort was made by any of the Cherokees.

Thus the treaty of 1846 was followed by solemn settlements between the Cherokees and the United States made pursuant to that treaty, and accompanied by receipts in full from the Cherokees, which

covered the claim here sued upon. As between ordinary parties, of course, those settlements would be conclusive. Similar settlements with the United States have also been held conclusive upon the Indians in the cases of the *United States* v. *Adams* (7 Wall., 463) and *The United States* v. *Childs* (12 Wall., 232). In the latter case Mr. Justice Miller said, on page 243:

> We lay out of view in this case, as in the Adams case, the receipts which they gave, under protest, in order to regain possession of their vouchers. But we can not disregard the finding of the Court of Claims that, after Congress had appropriated money to pay the sums found due by the commissioners, the claimants received the amount so allowed, and signed upon each voucher a receipt whereby they acknowledged having received said reduced amount "in full of the above account." And that at the time of receiving this payment they made no formal objection or protest, but were required to and did sign the receipt above described.

The United States has in this case no thought of interposing any technical defense of former settlement, but it does not seem unfair to urge that, in view of all the surrounding circumstances, the settlement with the Cherokee Nation and their receipts in full covering this identical claim should be here held conclusive.

It is true that in the case of the Western Cherokees their settlement and accompanying receipts were held not conclusive, both by the Court of Claims and by this court. But this conclusion was reached on the express ground that in the accounting with the Western Cherokees there had been charged against the treaty fund of $5,000,000 the cost of subsistence, in direct opposition to the resolution of the Senate of September 5, 1850, that the cost of subsistence was not properly chargeable to the treaty fund, and upon that point this court said:

> We agree, as was said in the case of *Choctaw Nation* (119 U. S., 1, 29), that where, in professed pursuance of treaties, statutes have conferred valuable benefits upon the Indians, "which the latter have accepted, they partake of the nature of agreements—the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient to the condition, unless that implication is rebutted by other and sufficient circumstances." And it is also true that when a party, without force or intimidation, and with a full knowledge of all the facts in the case, accepts, on account of an unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, he will not be permitted to avoid his act on the ground of duress. (*United States* v. *Child*, 12 Wall., 232, 244.)

But we think, under all the circumstances disclosed here, that Congress being convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to, and desirous, as being the stronger party to the controversy, that that superior justice which looks only to the substance and the right should be done in the premises, voluntarily waived any reliance upon lapse of time or laches, and, after attempts on its own part to arrive at a satisfactory result, determined to obtain a juridical interpretation of the treaties and laws bearing upon the subject, and to be found by judicial decision in respect of the conclusions flowing therefrom, and arrived at upon equitable principles; and that the jurisdictional act passed in effectuation of such intention left it open to the courts to readjust the amount notwithstanding the claim might have been theretofore settled. In other words, if the adjustment and settlement were found to have been made upon an erroneous interpretation, which led to an obvious mistake, then Congress designed that the mistake should be corrected. We therefore proceed to examine the account in question in accordance with what we believe to have been the intention of Congress in the passage of this act.

In the present case no such situation obtains, for in preparing the account for settlement with the Cherokee Nation the accounting officers expressly regarded this resolution of the Senate and

made no charge for subsistence against the treaty fund of $5,600,000. Moreover the jurisdictional statute in the Old Settlers case presented in terms the question "whether or not the said Indians have heretofore adjusted and settled their said claim with the United States" (148 U. S., 469), but the settlement is not so opened up in this case.

THE REPORT OF THE ATTORNEY-GENERAL UPON THE CONCLUSIONS OF LAW IN THE SLADE AND BENDER REPORT.

Reference has heretofore been made in this brief to the letter of the Attorney-General addressed on December 2, 1895, to Congress in response to the direction of Congress contained in the appropriation act of March 2, 1895, that the Attorney-General review and report upon the conclusions of law contained in the account rendered by Slade and Bender pursuant to the treaty of 1893 with the Cherokees. This letter appears in Senate Document No. 16, Fifty-fourth Congress, first session, but for convenience that part of the same which relates to the item of the cost of removal is here presented:

> The chief item in the schedule of amounts found due from the Government to the Cherokee Nation (Report, p. 32) is amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund, $1,111,284.70.
>
> After careful consideration I am unable to concur in the conclusion of the Department of the Interior as to this item.

By the treaty of 1835 the United States agreed to pay the Cherokees $5,000,000 for their lands east of the Mississippi and furnish them other lands to the westward. Supplementary articles were added in 1836, the second of which recites the fact that the Cherokee people supposed that such sum of $5,000,000 was not to include the amount required to remove them, nor certain claims, in which supposition they had been confirmed by the opinions of the War Department and some of the Senators who voted upon the question; that the President was willing that the subject should be referred to the Senate, and if it was not intended by the Senate that the $5,000,000 should include said subjects, then that such further provision should be made therefor as the Senate should think just. The third supplemental article therefore allows the additional sum of $600,000, to include the expense of removal and all claims of every nature and description against the United States not otherwise expressly provided for.

The $600,000 having been exhausted, however, a further provision of $1,047,067 was made June 12, 1838, in full of all the objects specified in the third supplementary article above named, and for the further object of aiding in the subsistence of the Cherokees for one year after their removal, with the proviso that no part of said money shall be deducted from the five millions stipulated to be paid said tribe by said treaty.

The various other objects of the two additional sums above named having reduced them below the amount required to pay the entire expense of removal, the question is whether the remainder was to be charged against the $5,000,000 or to be paid by the United States in addition thereto.

Whatever may be said as to the true construction in this regard of the treaty of 1835, with its supplement, and the subsequent acts of Congress relating thereto, it is certain that there was continual doubt and dispute about it, arising chiefly from the apparent contradiction between article 8, wherein the United States agreed "to remove the Cherokees to their new homes," and article 15, wherein "the amount which shall be actually expended for * * * removal" is mentioned among the items to be deducted from the sum to be paid. This is quite evident from the report of the Department of the Interior; but see also reports of committees, first session Twenty-eighth Congress. (Vol. 2, 1843–44, pp. 7, 17.)

In this situation the natural course was taken. The parties made a new treaty, proclaimed August 17, 1846 (9 Stat. L., p. 871), each appearing by duly constituted representatives, and there being no suggestion from any quarter of the slightest unfairness or misunderstanding.

The purpose of the treaty is clearly set forth in the preamble:

"Whereas serious difficulties have for a considerable time past existed between the

different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people against the United States: Therefore, with a view to the final and amicable settlement of the difficulties and claims before mentioned, it is mutually agreed by the several parties to this convention as follows, viz:"

There were three distinct classes of Cherokees, one known as the Old Settlers or Western Cherokees, who had removed before the treaty of 1835; another as the "Ross" or antitreaty party, who had opposed that treaty, and a third as "the treaty party," who had favored and finally carried it.

Article 4 of the treaty of 1846 dealt with the claim of the Western Cherokees to an interest in the property east of the Mississippi, notwithstanding their removal, for which they should be paid. The existence of such equitable right was admitted, and in order to ascertain its value it was agreed that—

"All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to $5,600,000 (which investments and expenditures are particularly

enumerated in the fifteenth article of the treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum or the amount which would, under such marshaling of accounts, be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one-third part of said residuum, to be distributed per capita to each individual of said party of Old Settlers or Western Cherokees."

It was further agreed that—

"So far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of $5,600,000 above mentioned, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835 as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted."

By article 9:

"The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the per capita division under the treaty of 29th of December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence and commutation

therefor, * * * the aggregate of which said several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over, per capita, in equal amounts, etc."

Article 11 dealt with the contention of the Cherokees that the amount expended for one year's subsistence after the arrival in the West of the Eastern Cherokees was not properly chargeable to the treaty fund, which was submitted to the Senate.

It is clear that the exact question now presented was raised and settled by the parties in that treaty. If confirmation were needed it could be found in article 12 (which the Senate did not approve), wherein the Western Cherokees claimed that in the settlement with them provided in article 4 "the expenses incurred for the removal and subsistence of Cherokees after the 23d day of May, 1838, should not be charged upon the $5,000,000 allowed to the Cherokees for their lands," etc. It will be noted that the date so named was after the expiration of the two years limited in the treaty of 1835 as the period within which removals must be made. The admission is evident that the expense of removals prior to that date was properly chargeable to the fund.

The other provisions of the treaty of 1846, while they do not in terms refer to the present question, strongly confirm the view I have taken, because they were intended to settle all possible questions of dispute, both among the different classes of Cherokees

and between them or any of them and the United States. The treaty contains many mutual considerations and concessions, on account of which it would have been quite natural for the Cherokees to abandon their claims as to expenses of removal, even if it were founded on the better reason. I see no escape from the conclusion that by that treaty they did abandon that claim, and therefore the item above referred to is not properly a debt of the United States.

It will be remembered that the provisions of the treaty of 1846 have been carried out. The matter of the charge for one year's subsistence, which was by article 11 submitted to the Senate and decided by it in favor of the Cherokees, was settled by restoring to the Cherokee fund $189,422.76 which had been charged against it.

The Western Cherokees having, notwithstanding this, been charged with commutation for subsistence under the provisions of article 4, a special act was passed authorizing them to sue in the Court of Claims to recover the amount so charged. They did sue and recovered the amount with interest. (*Old Settlers* v. *United States*, 148 U. S., 427.)

The petition in that case conceded that the charge for removal was proper under the treaty of 1846, but sought to reduce its amount by having it applied only to Cherokees who removed prior to the expiration of the two years named in the treaty of 1835.

I am unable to agree with the suggestion made in the report of the Department of

the Interior (p. 21) that the true construction of article 9 of the treaty of 1846 is that it was intended to make no change whatever in the treaty of 1835. This claim is based chiefly on the use of the word "properly." The United States agreed to make a fair and just settlement of all moneys due the Cherokees under the treaty of 1835, which said settlement shall exhibit all money properly expended under said treaty. If nothing more was intended than a mere reiteration of the obligations of the treaty of 1835, without any attempt to settle its disputed construction, it is difficult to imagine any occasion for the treaty. The language which follows that just quoted removes all doubt, viz, "and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence," etc. Certain purposes for which it was agreed that money had been "properly expended under said treaty" are here recited, and that of removal is one of them.

THE DISSENTING OPINION OF JUDGE WRIGHT.

In his dissenting opinion, Judge Wright sums up the whole question in the following comprehensive language:

> By setting aside the accounting of Slade and Bender as respects the charge for removals, we would be brought to a consideration of the case upon its merits, namely, the liability of the defendants for removals under the stipulations of the treaty of 1835. No subsequent act of Congress changed the

treaty in this respect. The appropriations made for such purpose were, in view of the provisions of the treaty, mere gratuities, and did not bind the defendants to assume further liabilities. Congress might do so if they saw fit, but no legal obligation was assumed in that regard. Plaintiffs are now here claiming under the treaty of 1835, and it is familiar doctrine that they can not at the same time both claim under and repudiate its provisions. That the treaty of 1835, unchanged as it is, charged the expense of the removals to the plaintiffs is too plain for argument, as will appear by reading it within its four corners.

If the conclusion reached by the majority of the court is to be accepted as the final award of the moneys claimed in this suit, it will prove the futility of accomplishing any settlement of disputed matters by the mutual agreement of the parties.

The Report of Senator Quarles.

The attention of the court is also invited to Senate Report, 57th Cong., 2d sess., an adverse report made upon this claim by Senator Quarles, for the Committee on Indian Affairs, on S. No. 5685.

THE OLD SETTLERS' CASE.

As already referred to, in the opinion of the Court of Claims the Chief Justice stated that the proposed suit of the Cherokees against the United States in the treaty of 1893 had already been decided against them, which is equivalent to say-

ing that the present suit, which is nothing more than a reinstatement of that proposed suit, has already been decided against the claimants. In so holding the opinion of the court, in effect, reiterates the decision of the Court of Claims in the case of *Old Settlers or Western Cherokees* against *The United States* (27 Court of Claims, 1), which decision was affirmed by this court in 148 U. S., 427.

The following extracts from the opinion of the court in that case, delivered by Mr. Chief Justice Nott, show that the very question here involved was carefully considered and fully disposed of:

> That treaty [of 1846] was a contract between three parties, the United States, the Eastern and Western Cherokees, which purposes were to make the Eastern and Western Cherokees parties to the treaty of New Echota (the treaty of 1835), which they had never conceded themselves to be, and to secure peace in the Cherokee country * * *.
>
> This fifteenth article is a part of the treaty of 1835 and of the compact between the United States and the Eastern Cherokees. It was not framed to express the compact and agreement between the United States and the Western Cherokees, and is not to be found in the treaty of 1846, except by reference. *As between the United States and the Eastern Cherokees, the rules for the construction of statutes and treaties would require that it should be deemed expressive of the intent of the parties, and that full effect should be given to each of its provisions.* * * *

> The treaty of 1846 regarded the two treaties as one instrument, *and brought together the amount named in both as one treaty fund, but at the same time made this augmented fund subject to an expenditure which was not a part of the consideration given for the lands east of the Mississippi, but ~~which~~ which was the primary and immediate object of the addition of $600,000.*
>
> * * * * *
>
> *As between the United States and the Eastern Cherokees, it would have been proper for Congress to have charged the whole cost of removal to the treaty fund and deducted it from the per capita payments.*

This decision also furnishes a complete answer to the eloquent recital of the story of the wrongs and sufferings of the Cherokee people previous to and during the time of the negotiation of the treaty of 1835 and the alleged frauds practiced upon them in the negotiation of that treaty, which will not unnaturally be made here.

In the Court of Claims the court held that the treaty of 1846 made all of the Cherokees parties to the treaty of 1835, and that this treaty must be regarded in the Supreme Court as a part of the supreme law of the land, which no court in this country, as a court of either law or equity, can declare to have been procured by duress or fraud and treat as inoperative. This court on the appeal of the case sustained that position unqualifiedly. (148 U. S., 468.)

THE QUESTION OF INTEREST.

By adopting as final the Slade and Bender account, the chief justice of the Court of Claims and one of his associates adopts also the finding in that account of "interest from June 12, 1838, to date of payment," on the $1,111,284.70, which that account charged against the United States as "amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund." (H. R. Ex. Doc. No. 182, 53d Congress, 3d sess., p. 32.)

It will be noted that the rate of interest does not appear in this finding, but the omission has been supplied by the court by fixing it at 5 per cent. As there is not a line in the Slade and Bender report discussing this question of interest, and as the Chief Justice and his associate in their respective opinions are likewise silent upon the subject, their indorsement of this part of the finding of the account of Slade and Bender amounts to an acceptance of the *ipse dixit* of Slade and Bender as to this momentous item, amounting at the time the judgment was rendered to $3,700,000 in round numbers. On the other hand, Judge Peelle, the only member of the court who discussed this question, advanced the following very cogent reasons against the allowance of interest:

> By Revised Statutes, section 1091, this court is inhibited from allowing interest on any claim "unless upon a contract expressly stipulating for the payment of interest."

There is no provision in either of the treaties of 1835 or 1846 respecting the payment of interest, except on the specific sums to be invested as provided by the treaty of 1835, and the court must therefore look elsewhere for authority, if interest is to be allowed.

No interest can be allowed on the sum under Revised Statutes, section 2096, as the same was not received under a treaty containing a stipulation for the payment of annual interest, but on the contrary was to be expended in defraying the cost of removal, etc. Nor can interest be allowed under Revised Statutes, section 2108, as the money is not going to incompetent or orphan Indians. Nor can interest be allowed under Revised Statutes, section 3659, as no interest has accrued thereon allowable by this court, nor has the same been invested in stocks of the United States or other interest-bearing securities.

As the act of February 27, 1851, *supra*, under which the settlement of 1852 was made, authorized the payment of interest from June 12, 1838, to April 1, 1851, on the sum appropriated, it may fairly be assumed that if the sum of $1,111,284.70 now in controversy had then been settled, interest would have been paid thereon as provided by the act. But that act has performed its office and the court can not look thereto for the payment of interest, even for the period stated, so that I have grave doubts as to whether there is any provision of law authorizing the court to allow interest on

> said sum, however much I may think it ought to be allowed; but for the purposes of this case I will assume the allowance of interest and the correctness of the distribution, as set forth in the court's opinion.

It is, however, undoubtedly but fair to Slade and Bender and to the justices of the Court of Claims who have indorsed their report, to say that this allowance is probably based primarily upon the resolution of the Senate adopted September 5, 1850, which reads as follows:

> *Resolved*, That it is the sense of the Senate that interest at the rate of five per centum per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid.

This resolution had reference to the accounting with the Cherokees provided for in articles 4 and 9 of the treaty of 1846.

Pursuant to this resolution the act of February 27, 1851, making appropriation for the payment to the Cherokee Nation of the amount found due in the account rendered in accordance with article 9 of the treaty of 1846, provided for interest upon the amount appropriated at the rate of 5 per cent from June 12, 1838, until paid, but not beyond the 1st of April, 1851. But, as justly said by Judge Peelle, *supra*, "That act has performed its office and the court can not look thereto for the

payment of interest, even for the period stated." This throws the inquiry back upon the Senate resolution of September 5, 1850, and the decision of the Court of Claims and of this court in the Old Settlers case. As far as the resolution itself is concerned, it relates in terms only to the amounts found due in the accounting provided for by the treaty of 1846. But, as has already been pointed out, the Western Cherokees, through a special jurisdictional act, had their account and their settlement made in accordance therewith, reopened by suit in the Court of Claims. This suit was permitted by Congress because of the earnest contention on the part of the Western Cherokees that in the accounting made with them the cost of subsistence had been charged against the treaty fund, whereas, by resolution of the Senate, this was expressly declared to be an improper charge.

This was a contention to which there was clearly no answer, and concerning it this Court held that the suit had been authorized because Congress was convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to, and for the purpose of allowing the courts to inquire and determine that matter. "In other words, if the adjustment and settlement were found to be made upon an erroneous interpretation which led to an obvious mistake, then Congress designed that the mistake should be corrected." (148 U. S., 473-474.)

The judgment of the Court of Claims in favor of the Old Settlers covered this improper charge, which constituted the greater part of the judgment, and certain other minor charges which were shown to be also clearly improper, and allowed interest upon the amount of this judgment in accordance with the Senate resolution above referred to. This court affirmed such allowance of interest as follows:

> Under section 1091 of the Revised Statutes no interest can "be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulated for the payment of interest;" and in *Pillson* v. *The United States*, 100 U. S., 43, it was held that a recovery of interest was not authorized under a private act, referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. (9 Stat., 556, c. 91.)
>
> In view of the terms of the jurisdictional act and the conclusion reached in reference

> to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item of $4,179.26, which stands upon different ground. (148 U. S., 478.)

But the facts in the present case are entirely different. The subject-matter of this claim is in no sense an item which the accounting officers in making the settlement provided for by the treaty of 1846 should obviously have included in that accounting. On the contrary, according to the decision in the Old Settlers case, their act in charging the whole cost of removal to the total $6,647,067 fund of the Cherokees was strictly warranted by the treaty of 1835 and the treaty of 1846.

Again, as has been already pointed out in this brief, by the treaty of 1846, under the authority of which those accounting officers acted, only the question of the cost of subsistence was left open, while the submission of the question of the cost of removal had been rejected from that treaty. Accordingly, any attempt on the part of the accounting officers to have rendered the account respecting the cost of removal in any other way than as was done by them would have been unwarranted usurpation. This claim, unlike that of the Western Cherokees, instead

of being for a correction of the accounting made under article 9 of the treaty of 1846, because of an obvious error in such accounting, is a claim involving an interpretation of various treaties, of the effect of a solemn settlement of and receipt in full for this very claim, of the effect of the treaty of 1893 upon that settlement and receipt in full; and, furthermore, is predicated by the Cherokee Nation solely upon the Slade and Bender account. Finally, it calls for a reversal of the decision in the Old Settlers case.

If, upon a survey of all these considerations, this Court shall reach the conclusion that the Cherokees are entitled to this claim, it is impossible to see how the resolution of the Senate of September 5, 1850, as to interest, can have any possible efficacy to provide for interest upon the claim thus found.

The United States earnestly contends that there are neither legal nor equitable grounds upon which this claim should be allowed, and asks, therefore, that as to it the judgment of the Court of Claims be reversed.

LOUIS A. PRADT,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT, v. THE CHEROKEE NATION.	No. 346.
THE EASTERN CHEROKEES, APPELLANTS, v. THE CHEROKEE NATION.	No. 347.
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APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

THE ATTEMPT TO CONSTRUCT AN ACCOUNT STATED OUT OF THE SLADE AND BENDER REPORT.

The counsel for the Cherokee Nation are so insistent upon the proposition that the Slade and Bender report is an account stated, despite the fact that the contention received such scant courtesy in the Court of Claims, that politeness seems to demand a somewhat more extended consideration of the same on the part of the United States than is given in its main

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brief. As to what constitutes an account stated, there is, or should be, no controversy. The essence of an account stated is a balance resulting from a statement of mutual accounts agreed upon between the debtor and creditor to be correct. And hence, in the very nature of things, the minds of the parties must meet. (A. and E. Enc. of Law, 2d ed., p. 442.) Each party must understand the transaction as a final adjustment of the respective demands between them, and they must come to an agreement as to the allowance or disallowance of the items composing the account and as to the balance struck. (Ib., p. 443.) There must be a definite acknowledgment of indebtedness. (Ib., 445.) An account stated, then, is a recital of facts, not theories, or, as said by his honor, Chief Justice Nott, in the case of *Nutt* v. *The United States*, 23 C. Cls., 73—

> "an account stated" grows out of commercial transactions, being the rendition of a running account by one party to the other and his acceptance or acquiescence in its accuracy and amount. It is therefore, in legal effect, but a liquidation of fractional items into a single amount by the agreement of parties, express or implied.

Examining the Slade and Bender report in the light of these definitions of an account stated, the United States concedes, without hesitation, that it is an account stated so far as it deals in facts—that is to say, in a recital of the mutual accounts between the parties, and it is only when it proceeds to make "assumptions" with relation to those facts and to superadd to

them judicial interpretations of various treaties and statutes that the United States contends that it loses its character of an account stated.

This view was first manifested by Congress in refusing to accept the conclusions of law set forth in the Slade and Bender report until they could be examined and reported upon by the Attorney-General of the United States. And from the time that Congress received the report of the Attorney-General disagreeing with the all-important conclusion of law in the Slade and Bender report, the United States, acting through Congress, has steadfastly refused to recognize the Slade and Bender report. Thus we find an utter lack of a meeting of the minds of the parties with relation to the balance resulting from the *assumptions* in the Slade and Bender report. In other words, the essential element of an account stated, which is a mutual agreement as to the amount due, is entirely wanting. And yet the claimant Cherokee Nation would have this court proceed upon the understanding that the exact reverse is the case.

In short, they ask this court to refrain from making the slightest examination into the merits of their claim, but instead to accept the judicial determination of the same made by two laymen and interjected by them into an account which they were appointed to render on behalf of the United States to the Cherokees—a determination which, according to the Court of Claims, is contrary to law—all upon the assumption that the United States and the claimant have mutually agreed to this identical conclusion of law; and this,

although the whole history of the case shows that the United States has steadfastly repudiated that conclusion since the time it was first brought to its attention.

Furthermore, this account was a statement rendered by agents of the United States. As such agents they of course must act strictly within the scope of their authority. In the case of *State* v. *Brown* (10 Oregon, p. 215), the court disposes of a very similar contention respecting a decision of the secretary of state, as follows:

> Another point contended for by the appellant is that if the auditing and allowance of a claim by the secretary should be deemed to be of no effect as a judicial determination, still it would operate to convert the same into an account stated and bar any recovery in an action at law where mistake only is alleged. But a stated account in this sense derives all its force from the agreement of the parties, express or implied. It is, in effect, a new contract in writing, and is equally conclusive in an action at law.
>
> * * * * *
>
> In the case here, there was no opportunity for any agreement. The secretary did not and could not have entered into any contract with the claimant. He was authorized to allow just what was due the claimant, according to his judgment, and was not justified in allowing anything beyond. If the State had contracted to pay so much, the secretary's power to audit the claim and allow what should appear to be due thereon, did not authorize him to enter into a new contract with the claimant through the form

> of a stated account, by which the latter might assert a claim to a greater amount than should be found due him under his original contract with the State.
>
> We think the secretary has no power to state an account with a claimant which will bind the State in this manner (pp. 228–9).

In the Nutt case, *supra*, this court, in affirming the decision of the Court of Claims, said through Mr. Justice Matthews:

> The same reasons dispose of the second proposition, and show that the report of the Quartermaster-General is no more an account stated between the parties than it is an arbitration and award. In order to constitute an account stated between individuals, the statement of the account must be adopted by one party and submitted as correct to the other. But here Congress did not adopt the report of the Quartermaster-General as its statement of what was due from the United States; nor was the report submitted to the claimant as a correct statement of the indebtedness. (125 U.S., 655.)

Upon this contention of the claimants the following comments in the Quarles report, heretofore referred to, are very pertinent:

> Now, the question is whether an agent authorized to render an account is empowered to do more than collect and arrange the several items in the nature of "debit and credit." Is it possible that under such an authorization the agent can set aside or ignore deliberate settlements theretofore made by the parties? Can he re-

> verse the construction put upon treaties by his principal, accepted by the other party, and mutually acquiesced in for years? Is he authorized to pass upon vexed questions of law and to bind his principal by his conclusions simply because he arranges such conclusions in the form of an account? In our opinion, the Government is not concluded by the findings of Slade and Bender, involving as they do many delicate questions of law upon which we are entitled to have the opinion of the Supreme Court before assenting to such radical legal conclusions.

THE TREATY OF 1828.

The agreement of the United States in the treaty of 1828 with the Western Cherokees, to pay the cost of emigration of all such Eastern Cherokees as might remove to the West and to subsist them for one year, seems to be greatly relied upon in the brief for the Eastern Cherokees. It appears, however, to have no relevancy or force in the present case, other than as it is an indication of the policy of the Government. This policy, as set forth in article 8 of that treaty, was to induce the Eastern Cherokees to remove. But the treaty of 1828 was made with the Western Cherokees and not with the Eastern Cherokees, and therefore, of course, it contains no mutual agreements between the United States and the Eastern Cherokees on the subject of removal.

On the contrary, the treaty of New Echota was with the Cherokee tribe of Indians, and the occasion and

express purpose of it was the removal of the Eastern Cherokees, which the Cherokees agreed unconditionally to do within two years. The treaty also provided, according to the contention of the United States, that the cost of such removal should be paid out of the $5,000,000 treaty fund, whereas the Cherokees contend that by the terms of the treaty all cost of removal above the $600,000 addition to the treaty fund must be borne by the United States.

So, in either view of the question, the treaty of New Echota contained mutual and complete agreements between the United States and the Cherokees on the subject of removal, thus, of course, wholly doing away with the unilateral agreement of the treaty of 1828 on that subject

THE OPINION OF ATTORNEY-GENERAL BUTLER.

Attorney-General Butler, in his opinion on the subject of compensation to Cherokee reservees (3 Op. A. G., 297), makes this comment:

> The expense of removal is undoubtedly the first charge on the fund of $600,000, the removal of the nation being an object of necessity and paramount importance, and the balance is to be applied to the satisfaction of the various claims which shall have been established.

There seems to be great reliance placed upon this observation by counsel for the Eastern Cherokees. The reason for it, however, is not plain. The cost of removal is undoubtedly mentioned first in the third supplementary article, and it was probably an expense of

more vital importance to the general body of Cherokees than the payment of the various claims, including spoliations, also provided for in that fund. But there is nothing in the wording of the article that makes the cost of removal any more legitimate a charge upon the $600,000 fund than the claims for spoliations, for instance. Certainly under its provisions, the United States would have been warranted in paying the claims for spoliations in full out of this fund, even at the expense of a portion of the cost of removal. But however that may be, this opinion does not touch upon the question at issue in this case, and it is only by the most speculative inferences therefrom that a guess might be made as to what would have been the opinion of Attorney-General Butler on that question.

THE OPINION OF ATTORNEY-GENERAL LEGARE.

This opinion (4th Op. A. G., 73) relates simply to the expenses of the commissioners under the Cherokee treaty, holding that such expenses are not a proper charge upon the treaty fund. This very matter was considered in the subsequent treaty of 1846, and provision made for it and other improper charges in article 3 of that treaty. That is all there is to it, and nothing more can be made out of it.

THE RELATION OF THE SECRETARY OF THE INTERIOR TO THE SLADE AND BENDER ACCOUNT.

In the brief for the Eastern Cherokees a quotation is made from the opinion of the Court of Claims, wherein Chief Justice Nott says that it was in the dis-

cretion of the Secretary of the Interior to accept or adopt the Slade and Bender report, or to remand it for alterations and corrections; that "he was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out, and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. The Secretary did not recall the account, the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was at the same session, or certainly within the prescribed twelve months, to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered." (Rec., p. 51.)

The agreement in the treaty of 1893 for this accounting furnishes no warrant for the contention that the Secretary of the Interior had any discretion whatever in the premises. Through his Department, to be sure, the accountants were selected, but as far as the United States was concerned, in Congress alone was vested the authority to act upon the same. The logical result of this contention is, that if the Secretary of the Interior had been of the opinion that the five million dollar treaty fund had been properly charged with the extra cost of removal, he might have rejected any account that did not so recite; and yet that, according to the opinion of the court, would have been to thwart absolutely the intention of the agreement for the accounting. Surely such plenary power in an executive officer

of the Government to render naught the provisions of a solemn treaty could only exist by explicit recital.

And yet the Secretary of the Interior is not even mentioned in the treaty of 1893 in connection with this agreement for an accounting. Indeed, the opinion of the court itself, as above cited, goes on to recognize the authority of Congress in the premises and to criticise that body for not calling for another account within the twelve months. But this criticism does not seem to be justified. The account was accepted by the Cherokee Nation on December 1, 1894, and on January 8, 1895, was transmitted by the Secretary of the Interior to Congress. Congress, finding that the account contained conclusions of law, called upon the Attorney-General, in the appropriation act of March 2, 1895, in the closing days of the session, to review and report upon these conclusions of law. The reply of the Attorney-General was made to Congress at the opening of the following session, but by that time over twelve months had elapsed since the acceptance of the account by the Cherokees, and, accordingly, in view of that report, there was nothing further for Congress to do in the matter, its disapproval of the report being unmistakable.

TRUST FUNDS.

The five-million-dollar fund is treated in the brief for the Eastern Cherokees as a trust fund, and therefore sacred.

As a matter of fact but $500,000 of this fund was a trust fund. The remainder, less $500,000 for addi-

tional lands, was, by the express terms of the treaty of New Echota, made applicable to the payment of various expenditures, largely to individuals, the amount paid to individual Indians for improvements alone being over $1,500,000, and for ferries owned by individual Indians $160,000, in round numbers. Finally, the surplus was devoted to and was paid to the Indians per capita, and not held in trust for them at all. It is simply trifling with the plain meaning of the words "trust fund," especially as used with reference to Indians, to say that the sums thus intended and used were in any sense a trust fund.

THE USE OF THE APPROPRIATION OF 1838.

Counsel for the Eastern Cherokees place much stress upon the fact that but $49,000 was used out of the appropriation of $1,047,000 made for expenses of removal and subsistence by the act of June 12, 1838, whilst the remainder was applied to the cost of subsistence. But the explanation of this fact is very simple. At that time, in the view of the United States authorities, the treaty fund of five million dollars was chargeable with all extra cost of removal and subsistence, and such, indeed, was the situation until the Senate in 1850, as an act of grace, decided that the United States should bear the cost of subsistence. Accordingly, it was clearly a matter of indifference whether the appropriation of 1838, the greater part of which was in terms for subsistence, were used in whole or in part for that purpose, since the net result to the Indians must be exactly the same. It is obvious, too, that the

subsistence of the Indians for one year after their removal was a matter that must of necessity first be provided for, and thus we find that the sum of $487,000, part of the cost of removal under the Ross contract, was not paid until 1841. (Rep. No. 288, p. 2.)

VESTED RIGHTS UNDER THE TREATY OF NEW ECHOTA.

Article 10 of the treaty of 1846 provides that nothing in that treaty shall be so construed as in any manner to take away or abridge any rights or claims of the Eastern Cherokees under the treaty of New Echota. Relying upon this article, counsel for the Eastern Cherokees contend that its force is to constitute the payment of any portion of the cost of removal of the Eastern Cherokees out of the five-million-dollar fund an impairment of their rights under the treaty of New Echota, but that, of course, is simply a begging of the whole question.

ARTICLE 3 OF THE TREATY OF 1846.

By article 3 of the treaty of 1846, it is provided, amongst other things, that—

> Whereas the expenses of making the treaty of New Echota were also paid out of said fund [of five million dollars] when they should have been borne by the United States, the United States agree to reimburse the same and also to reimburse all the other sums paid to any agent of the Government and improperly charged to said fund.

These payments to various agents of the Government amounted to $96,999.42, which amount was re-

imbursed the Indians by the appropriation act of April 27, 1851 (9 Stat. L., p. 572; see Rec., p. 98), the amount there appropriated being made up of the balance found due in the accounting made under article 9 of the treaty of 1846 with the Eastern Cherokees, $627,603.95, and the payments to agents above stated of $96,999.42. (Slade and Bender Report, pp. 21 and 22.)

And now, at this eleventh hour, come the counsel for the Eastern Cherokees and say, on page 84 of their brief:

> The amount now sued for was paid to Captain John Page, an "agent of the Government," in 1838, and expended by him on account of removal expenses and was "improperly charged to said fund," and under the 3d article of this treaty should be reimbursed.

This is a most momentous contention, and yet it is proffered as delicately as though it were a rose leaf. What is the explanation of this modest coyness in setting forth a proposition which, if true, is the end of controversy in this case? Plainly, that counsel place no sort of reliance upon a contention so novel that it has never before occurred to the claimants, and was not even hinted at in the protest of the Cherokee Nation made on the 27th of November, 1851, against the accounting under article 9 of the treaty of 1846. (Rec., pp. 98–99.) It needs only a glance at the language of article 3, under consideration, to show that it refers only to payments made to agents of the Government for their services and expenses.

These various agents are enumerated in the account of the Eastern Cherokees (Rec., p. 98) as follows: "Superintendents, clerks, interpreters, disbursing, issuing, and enrolling agents, conductors, and contingencies." The Captain Page referred to was the disbursing officer of the Government who handled the various funds appropriated pursuant to the treaty of New Echota and by the act of June 12, 1838, and so far from "the amount now sued for" being paid to him as agent of the Government, every dollar was paid out by him for the United States; and to now contend that the amount of this claim was one of the reimbursements contemplated by the concluding clause of article 3 of the treaty of 1846 is to attempt to juggle with words.

LOUIS A. PRADT,
Assistant Attorney-General.

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FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

Supreme Court U. S.
FILED
JAN 22 1906
JAMES H. MCKENNEY,
Clerk

THE UNITED STATES, APPELLANT,
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No. 346.

THE EASTERN CHEROKEES, APPELLANTS,
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THE UNITED STATES.

No. 348.

APPEALS FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

LOUIS A. FRADT,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

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APPEALS FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

This additional brief is made in reply to certain portions of the brief for the Cherokee Nation, which brief was received by the counsel for the United States very shortly before the argument of the case in this court. It is also in reply to certain contentions at the oral argument by counsel for claimants to which counsel for the United States did not have time to then answer.

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By stating the account from the standpoint of the Cherokees as to the item here in question, Slade and Bender constituted themselves, in effect, the agents of the Cherokees, and their statement of the account as to this item was thus virtually the statement of the Cherokees, requiring the acceptance of the United States to give it the character of an account stated. This acceptance it never received.

As to the provision in the agreement for the payment by Congress of amounts found on such accounting to have been withheld by the United States from the Cherokee Nation, the account showed three just such items (for which judgment has been rendered in this action), and to that extent was just such an account as was intended by the agreement. And thus this particular provision was made effectual.

And now, following up this line of inquiry, counsel for claimants have not met the proposition of the United States that every provision of the agreement should, if possible, be given force and effect, and that this could only result through a statement of the account as it appeared on the books of the United States, thus allowing the Cherokees an opportunity to test in the courts the action of the United States in charging a part of the cost of removal to the five million dollar treaty fund, and so giving effect to the provision in the agreement for the accounting for precisely such action.

Counsel for claimants have quoted with approval the report of the Commissioner of Indian Affairs to the Secretary of the Interior commenting upon this very

agreement. But in that report the Commissioner pointed out that the agreement seemed to call for exactly such a statement of the account as is contended for by the United States, using the following language:

> If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement, herewith inclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose. (Rec., p. 405.)

Congress, in making provision for the appointment of the accountants, acted directly in line with this suggestion. (Rec., p. 107.) And was it not, therefore, the sole duty of those accountants, so appointed, "*to review and copy the Cherokee accounts and records?*"

Accordingly there arises this question, which has not as yet been answered:

If Slade and Bender had rendered an account which, in the above language of the Commissioner of Indian

Affairs, had been a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds, under the treaties and acts of Congress referred to in the agreement of the treaty of 1893, providing for such accounting, would it not have been a full and complete compliance with all the provisions of that agreement? And would there not then have been this marked but most reasonable and logical difference in the situation, that thereupon the questions of law involved in this claim of the Cherokees would have been, through the suit provided for in the same agreement, presented for determination by the courts, instead of being prejudged by the accountants? And what possible ground of complaint would there have then been on the part of either the Cherokees or the United States?

There is urged in support of the contention that it was intended that the account should be stated on the legal theory of the Cherokees, that in the preliminary negotiations upon which followed the agreement of 1891, which was the basis of the treaty of 1893, the Commissioners who acted for the United States in the negotiations said, among other things:

> The Government has made the accounting; has kept the books; has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected.

But this language is in entire consonance with the theory of the Government as to the accounting.

It will be noted that what is contemplated is that there shall be a restatement of the whole account as kept by the Government in its own books and according to its own construction of the treaties: that if this had been done properly—that is, accurately and according to law—it would, of course, be satisfactory; but if it had not been done properly—that is, if in the opinion of the Cherokees either the mathematics were at fault or the Government's construction of the treaties was unwarranted—then the error could be corrected. That is to say, it was the statement of the account itself which would present the questions of error, if any, on the part of the United States to be corrected. And how corrected? By the courts, as provided for in the agreement.

At the oral argument counsel for the Eastern Cherokees stated that in the Slade and Bender account there is charged against the Cherokees for debts and claims upon the Cherokee Nation $101,348.31 (Slade and Bender account, p. 23); whereas this court, in the Old Settlers case, had decided two years before that this item should be $60,000 (148 U. S., p. 477). The purpose of counsel was to show that Slade and Bender had not in all respects favored the Cherokees in their account, but unwittingly he has here furnished the strongest evidence of the bumptiousness and incompetency of those accountants in their assumed rôle of chancellors, in that they were either ignorant or careless of all judicial decisions, being a law unto themselves.

Another significant fact is that during these negotiations the Cherokees were asserting a claim for not only the principal but interest. This claim for interest was essentially one to be decided by the courts and not by the accountants, as there was nothing in the treaties named that had any reference to interest. And the best evidence of the unfitness of these accountants to deal with that question is to be found in the fact that they allowed interest on the claim here in dispute without giving any reason for the same.

Finally, if a report on the legal theory of the Cherokee Nation were intended, why did not the agreement in the treaty of 1893 so recite in terms?

The jurisdictional act of 1902.

In urging this claim upon the basis of the Slade and Bender account, counsel for claimants seem to have utterly lost sight of the jurisdictional act under which this action is brought. That act gives jurisdiction to the Court of Claims to examine, consider, and adjudicate, with a right of appeal to this court, any claim which the Cherokee tribe, or any band thereof, may have against the United States arising under treaty stipulation. Prior to the passage of this act Congress for a long time had been besieged by the claimants to allow this claim upon the basis of the Slade and Bender account, yet the act makes no reference whatever to that account, but provides instead for an examination into the treaties out of which it was alleged by the Cherokees their claim arose.

Now conceding for the sake of argument that the Slade and Bender account was binding upon the United States at the time on the theory of the claimants in this action, it was then a settlement of this claim, but in 1851 the Western and Eastern Cherokees, acting separately, but altogether constituting the Cherokee Nation, made complete settlements of all their claims against the United States. So that when this jurisdictional act was passed this claim had been the subject of two settlements, one in favor of the United States and the later one in favor of the Indians, this later one ignoring the prior settlement of 1851. Now is it not clear from the language of this jurisdictional act that the court is warranted in going back of both of these settlements to inquire into the very merits of this claim, and is there any consistency or justice in the contention of the claimants that their solemn settlement of 1851 should be ignored and only the alleged settlement of the Slade and Bender account be made effective? There is certainly much significance in this reluctance on the part of counsel for the Cherokee Nation to have the merits of this claim decided irrespective of any and all alleged settlements thereof. To be sure when this action was brought in the Court of Claims, the claimants contended that the Slade and Bender account was an award, and that contention, if it could have been maintained, would of course have precluded all further inquiry on the principle of *res adjudicata*, but on this appeal that contention has been for manifest reasons abandoned and the Slade and Bender account is relied

upon as an account stated; that is a settlement of this claim between the United States and the Cherokees.

But, say counsel for the Cherokee Nation, whilst it is true that the Western and Eastern Cherokees, as individuals, have given receipts in full of all claims on their part arising out of these various treaties against the United States, and whilst it is true that the Western and Eastern Cherokees together constitute the Cherokee Nation, nevertheless the Cherokee Nation, as such, never made any settlement nor gave any receipt for this claim, and therefore is now free to assert it despite those settlements. As stated, this proposition has a very dubious sound, and in the light of the facts it has no foundation whatever. In the settlement made by the Western Cherokees each of them receipted in full of all demands under the provisions of the treaty of the 6th of August, 1846, according to the principles established in the fourth article thereof, and in compliance with the appropriation act of September 30, 1850, which each receipt recited, that the money thus paid was to be in full of all such demands. Subsequently, in the Old Settlers' case, this settlement was reopened, and the Western Cherokees were allowed to assert any and all further claims on their part against the United States.

Those claims were considered and judgment rendered as to a portion of them in favor of the Western Cherokees, which judgment was thereafter paid in full by the United States. Thus, clearly, the Western Cherokees, as such, have no standing whatever in this action, having already had their full day in court.

Furthermore, the Western Cherokees never had, nor asserted, any interest whatever in this claim. In the settlement which was made with them in 1851 the cost of removal with which they were charged did not diminish the five-million dollar treaty fund one cent, but came entirely from the $600,000 added to that fund by the third supplemental article of the treaty of New Echota, and the payment that was made to them pursuant to the fourth article of the treaty of 1846 was not a third of the residuum of the treaty fund, but a sum equal to a third. Hence, it was the Eastern Cherokees only who were interested in the actual residuum of the treaty fund, and thus it was that article nine of that treaty made provision for the payment to Eastern Cherokees only, of that balance and provided for a fair and just settlement of all moneys due to the Cherokees and for a payment of the same per capita to the Eastern Cherokees.

Hence, whatever was found due under this settlement was to be the property, not of the Cherokee Nation, but of individual Eastern Cherokees per capita. Accordingly, the Cherokee Nation, as such, had no interest at the time in this claim and were connected with it simply because they officially represented the Eastern Cherokees, or, as Mr. Owen puts it, the term *Cherokee Nation* meant *Eastern Cherokees.* And accordingly, because of this representative relation to the Eastern Cherokees of the Cherokee Nation, Congress, by the act of February 27, 1851, appropriated the amount due on the accounting provided for by

article 9 of the treaty of 1846 for payment to the Cherokee Nation, with the further provision that it should be in full satisfaction and final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States under any treaty heretofore made with the Cherokees, and with the further provision for a receipt in full of all such claims when said appropriation was paid. But since, as above stated, this money was due to the Eastern Cherokees, individually, and the Cherokee Nation as such had no interest in it whatever, the receipts provided for under this appropriation were executed by the individual Eastern Cherokees, and each of them recited the proviso of the appropriation act requiring the Cherokee Nation to execute a full and final discharge of all claims and demands whatsoever against the United States. Therefore, for the Cherokee Nation to now say that this was not in effect and in essence a settlement of this claim by the Cherokee Nation, so far as it can be said to have had any interest whatever in said claim, is to palter with the facts.

Equally extraordinary and unfounded is the contention made on behalf of the Eastern Cherokees that in the settlement made and receipts given by them in 1851 this claim was not included, because of the exception in the appropriation act from the operation of such receipts of "such moneys and lands, if any, as the United States may hold in trust for said Cherokees." The sum here claimed, it is contended, was covered by this exception because it

was held in trust for the Cherokees. There is not a shadow of foundation for this statement. The sum here claimed was deducted from the five million dollar fund. If it had not been so deducted it would have increased to that extent the amount to be distributed per capita among the Eastern Cherokees as they allege themselves in their petition. Accordingly when the account with the Eastern Cherokees, pursuant to article 9 of the treaty of 1846, was made, and when the Eastern Cherokees, in 1851, made their settlement and gave their receipts in full of all claims against the United States on the basis of that account, they settled and gave receipts in full for all claims for money arising out of the treaty fund for per capita distribution; thus directly receipting in full, for this very claim. That they did so with full and actual knowledge thereof is evidenced by the fact, that prior to such settlement they made a protest against the accounting, based first of all upon the contention that no part of the cost of removal should have been charged against the treaty fund as had been done in the account (Rec., p. 98), which is precisely the claim here under consideration.

Furthermore, counsel for the Eastern Cherokees have repeatedly reiterated that this claim has always and on all possible occasions been asserted by the Eastern Cherokees ever since it first arose. Finally, the exception of moneys held in trust by the United States by the Cherokees which the Eastern Cherokees here pretended to rely upon manifestly relates to actual

trust funds, such as the $500,000 which were devoted to various trust purposes out of the treaty fund of the treaty of New Echota; whereas the amount here claimed, if it had been allowed the Cherokees in the settlement of 1851, would, instead of being held in trust for the Cherokees, have been paid under article 15 of the treaty of 1835 and article 9 of the treaty of 1846 directly to the individual Eastern Cherokees per capita. Hence, the contention that the settlement of 1851 by the Eastern Cherokees did not cover this claim, is not only unwarranted but is unworthy.

It was stated at the oral argument by the counsel for the Eastern Cherokees that after the treaty of 1835 the Eastern Cherokees had no more dealings with the United States. This is a remarkable assertion when it is remembered that the Eastern Cherokees were parties to the subsequent treaty of 1846, concerning which treaty the court stated, in the case of the *Western Cherokees v. The United States* (27 C. Cls., p. 36):

> That treaty was a compact between three parties—the United States, the Eastern, and the Western Cherokees. Its purpose was to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be, and to secure peace in the Cherokee country.

The counsel for the Eastern Cherokees are under a curious misapprehension as to the purposes of the appropriation of June 12, 1838. Their idea of this appropriation is that the whole of it was intended primarily for removal because the language of the

appropriation act recited that a portion of it was to be in aid of subsistence. This counsel interprets to mean that such portion was to be used for subsistence as might be left after the cost of removal had been paid from the appropriation. But counsel forgets that this appropriation was made with direct reference to an estimate of the Secretary of War, which estimate designated but $435,900 for removal and all the remainder as the estimated cost of subsistence. Hence the provision of the appropriation act as to *aiding* in subsistence meant simply that the amount estimated by the Secretary of War as the cost of subsistence was appropriated for that purpose, but that a further appropriation for the same purpose might follow if necessary. But the same appropriation act made the amount estimated by the Secretary of War as the cost of removal together with what remained of the $600,000 fund for that purpose, a fund *in full for the cost of removal.* See report of the committee having under consideration the proposition to make a further appropriation for subsistence under article 11 of the treaty of 1846, quoted in the Old Settlers' case in this court (148 U. S., at p. 452), and cited in the main brief in this case on page 85.

Interest.

In the course of the argument of counsel for the Cherokee Nation it was stated that in the negotiations preceding the articles of the agreement of December 19, 1891, which articles became a part of the treaty of

1893, the Cherokees asserted a claim for interest as well as principal. So far as this fact is relied upon to show that at the time of the adoption of said agreement the United States was aware that the Indians asserted a claim for interest, it is, of course, perfectly correct. But it is difficult to see how the fact that the Indians claimed interest constitutes in itself any argument to support that claim.

Alleged trust funds.

But the counsel for the Eastern and emigrant Cherokees makes the serious contention that the money which is the subject of this claim was a part of an interest-bearing trust fund, and therefore should be restored with interest from the time that it was taken from such fund.

This contention seems to be urged also, with some modifications, by other counsel for claimants. It is, however, not supported by the facts. The only part of the five million dollar treaty fund that was a trust fund was the sum of $500,000.

As for the particular sum which is here claimed, if it had not been used to pay a part of the cost of removal of the Cherokees under Article 15, of the treaty of 1835, and Article 9, of the treaty of 1846, it would have been distributed per capita to the Eastern Cherokees, and hence it had not and never could assume the character of a trust fund, much less an interest-bearing trust fund.

As has already been pointed out, the interest that was paid upon the amounts due under the accounting

with the Western and Eastern Cherokees, pursuant to the treaty of 1846, was so paid because the Senate, by resolution, decided that it ought to be paid. There is nothing in the resolution itself to show the reasons for this conclusion, but obviously it was because the payments of these amounts had been delayed beyond the two years within which it was expected that the Indians would be all removed under the treaty of New Echota, and when therefore the accounts with the Indians could be closed and the per capita distribution made. For this delay the Senate clearly held the United States at fault, and therefore allowed the interest. At any rate it is perfectly clear that the interest was not allowed because these amounts were a part of an interest-bearing fund, nor because of any provision in either of the treaties or in any statute relating thereto, providing for the payment of interest.

Another argument advanced on this subject is that the United States have conceded the allowance of interest on the three smaller items found due the Indians in the Slade and Bender account. The following recital, however, fully explains why that concession was made by the United States and completely meets this argument.

The $2,125 found due under the treaty of 1819 was the value of lands which should have been sold for the benefit of the school fund of the Cherokees, which was interest bearing. (S. & B. Report, 3 and 4.)

The $432 found due under the treaty of 1866 was an admitted balance on sales of the Cherokee Strip,

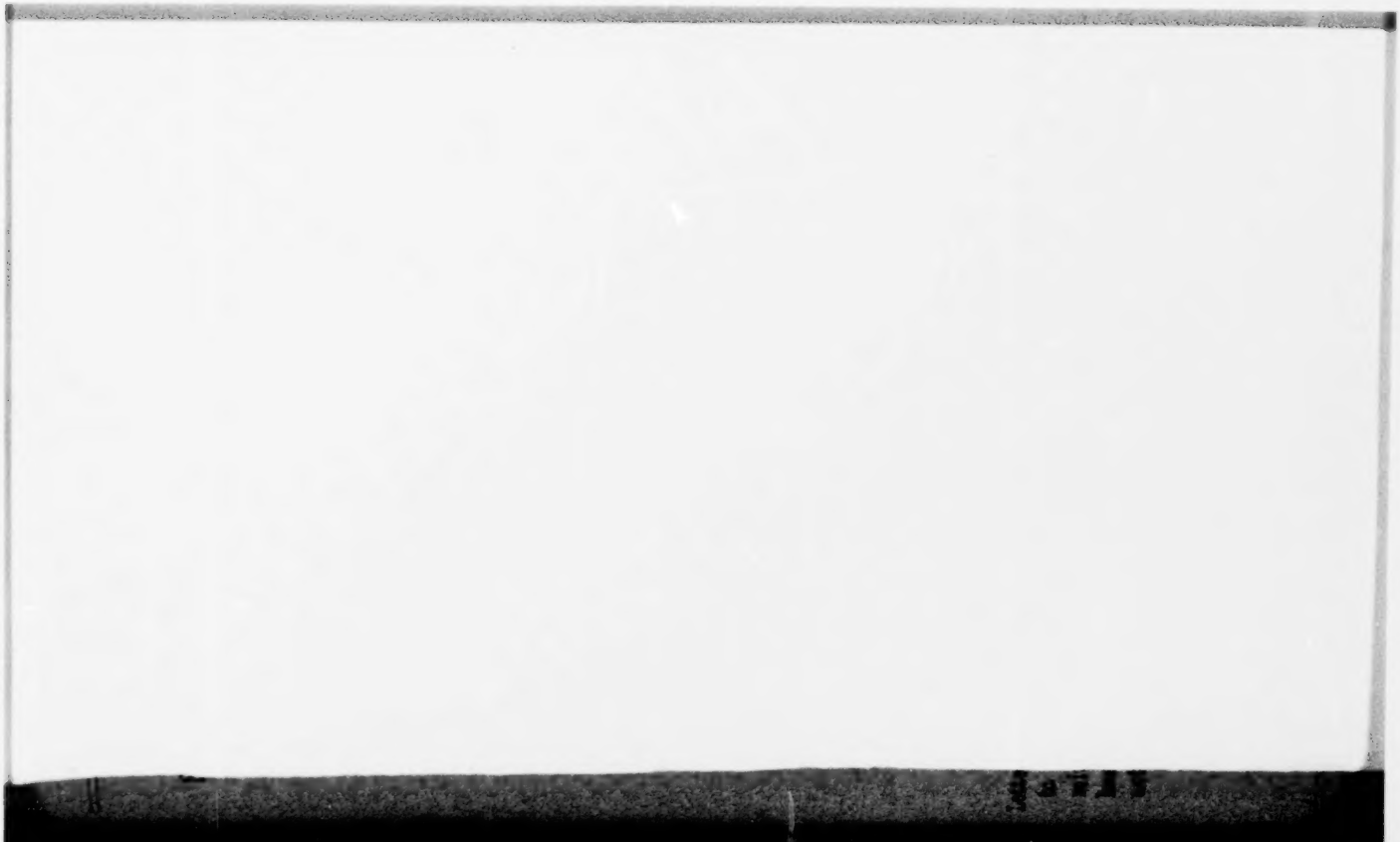
which should have been added to interest-bearing trust funds. (S. & B. Report, 26 and 27.)

The $20,406.25 found due under the act of March 3, 1893, was interest on $15,000 of Choctaw funds, which $15,000, in 1863, was inadvertently used for relief of indigent Cherokees. The error was discovered in 1890 and the $15,000 was restored from interest due upon the Cherokee national funds. This interest amounted in 1893 to the above amount of $20,406.25, diminishing the national trust fund to that extent through the error of the United States. Accordingly, the United States was in duty bound to make this diminution good, and as it was a trust fund thus diminished, to pay interest upon it. (1 A. S. R. 29)

Thus it appears that, as to all items of their account but the one here in question, Slade and Bender allowed interest for good and sufficient reasons.

LOUIS A. PRADT,
Assistant Attorney-General.

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FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 346.

THE UNITED STATES, APPELLANT,

vs.

THE CHEROKEE NATION.

White Supreme Court U. S.
FILED
JAN 4 1905
JAMES H. MCKENNEY,
Clerk.

No. 347.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE CHEROKEE NATION.

No. 348.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

53D CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { Ex. Doc. No. 182.

MONEYS DUE THE CHEROKEE NATION.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING

A COMPLETE ACCOUNT OF ALL MONEYS DUE THE CHEROKEE NATION UNDER TREATIES MADE IN COMPLIANCE WITH THE ACT OF CONGRESS APPROVED MARCH 3, 1893.

JANUARY 9, 1895.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, January 7, 1895.

SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stat. L., 645), a certified copy of "a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1865, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect," prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of the Cherokee national council accepting such accounting.

Very respectfully,

HOKE SMITH, *Secretary.*

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
Washington, D. C., January —, 1895.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed statement is a true and literal copy of the original, as appears from the records and files of the Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

HOKE SMITH,
Secretary of the Interior.

The undersigned, appointed under the 3rd article of the agreement made at Tahlequah on the 19th day of December, 1891, between Commissioners on the part of the United States, and on the part of the Cherokee Nation, to "render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of monies due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835-6, 1841, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect," respectfully submit the following report.

TREATY OF 1817:

The treaty of 1817 provided for the cession of certain lands in Georgia, Tennessee and Alabama to the United States in consideration of certain lands, acre for acre, in the then Territory of Arkansas, on the Arkansas and White Rivers. Appended hereto are maps showing the several cessions of territory by the Cherokee Nation, and also to the Cherokee Nation, covered by the treaty of 1817* and subsequent treaties. The cessions to and by the United States are shown upon both maps in blue. No consideration other than land was made to the Cherokee Nation for the cession of the lands in the states named. The treaty provided, however, that the annuities accruing under former treaties should be paid to the Eastern and Western Cherokees in proportion to their numbers, and a census of those who had emigrated west of the Mississippi River as well as those remaining in the original country was to be taken to determine the respective amounts of the annuities due to each branch of the Nation.

These annuities arose under the treaty of June 26, 1794,† which stipulated that in lieu of all former sums to be paid annually the United States should furnish the Cherokee Nation with goods, annually, to the amount of $5,000; the treaty of October 2, 1798,‡ by which the United States agreed to furnish the Cherokee Nation annually, in addition to the annuities provided for in former treaties, goods to the amount of $1,000; and the treaty of October 25, 1805,§ by which the United States guaranteed a further annuity of $3,000. Under these treaties, therefore, the Cherokee Nation was entitled annually to goods or money to the amount of $9,000.

The census provided for in the treaty of 1817 was not taken; but by the treaty of February 27, 1819,‖ it was agreed that the annuities should be paid two-thirds to the Cherokees east, and one-third to the Cherokees who had emigrated to Arkansas. These annuities were regularly paid according to this agreement to and including the year 1824.

*U. S. Statutes at Large, Vol. 7, page 156.
†U. S. Statutes at Large, Vol. 7, page 43.
‡U. S. Statutes at Large, Vol. 7, page 62.
§U. S. Statutes at Large, Vol. 7, page 93.
‖U. S. Statutes at Large, Vol. 7, page 195.

TREATY OF 1804.

By a treaty made October 24, 1804,* an additional annuity of $1,000 per year was guaranteed to the Cherokee Nation. This treaty was mislaid in Washington and its existence seems to have been forgotten until 1824, when it was discovered and proclaimed on the 17th day of May. It is this treaty, made in 1804, which is alluded to in the articles of agreement before-mentioned, (dated December 19, 1891,) as the treaty of 1825. No treaty, as a matter of fact, was made with the Cherokees in this year. The twenty years accrued annuity under this treaty was appropriated March 3, 1825,† and the accrued interest, amounting to $12,889, being for the average time of 10½ years at 6%, was appropriated June 14, 1836.‡ The annuity of $9,000, increased to $10,000 by the treaty of 1804, was fully, though by no means regularly, paid down to and including the year 1835, when it was commuted for the sum of $214,000, in accordance with the eleventh article of the treaty made December 29th of that year. There is nothing due the Cherokee Nation, therefore, under the treaty of 1817.

TREATY OF 1819.

By the treaty of February 27, 1819,§ a further cession of land was made by the Cherokee Nation, the ceded land being shown on the map hereto annexed in red. By the first article of this treaty it was stipulated that the reservations contained in the 2nd article of the treaty of Tellico, signed 25th October, 1805,‖ and a tract of land in Alabama, twelve miles square, were ceded to the United States in trust for the Cherokee Nation as a school fund; to be sold by the United States and the proceeds invested as provided in the 4th article of the same treaty. By article 4, it was stipulated that the reservations, and the tract reserved for a school fund in the first article of the treaty, should be surveyed and sold in the same manner and on the same terms with the public lands of the United States, and the proceeds invested under the direction of the President of the United States in stock of the United States, or such other stock as he might deem most advantageous to the Cherokee Nation.

The tract of land twelve miles square located on the Tennessee River in Madison County, Alabama, containing 93,938.16 acres was surveyed, and there have been sold, up to April 1, 1894, 67,657.63 acres, yielding $106,383.20, the several sums comprising which have been from time to time added to the school fund of the Nation.

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* U. S. Statutes at Large, Vol. 7, page 228.
† U. S. Statutes at Large, Vol. 4, page 93.
‡ U. S. Statutes at Large, Vol. 5, page 45.
§ U. S. Statutes at Large, Vol. 7, page 196.
‖ U. S. Statutes at Large, Vol. 7, page 93.

The reservations in the 2nd article of the treaty of Tellico (27th October, 1805), consisted of a small tract lying at and below the mouth of Clinch river; two sections of one square mile each, one at the foot of Cumberland mountain, the other on the north bank of the Tennessee river "where the Cherokee Taloostiskee now lives." These tracts, being on the north side of the Tennessee river within the State of Tennessee, are indicated upon the accompanying map by letters "A," "B," and "C." Tennessee not being a public land State there was no authority for the survey and sale of these lands. They were claimed by white persons by virtue of Revolutionary land grants made by the State of North Carolina, and by other persons under grants made by the State of Tennessee, and after much controversy and compromise were finally confirmed to citizens of Tennessee.

The history of the litigation and subsequent disposal of these lands is of no importance beyond the fact that, although they were ceded by the Cherokee Nation to the United States in trust, for sale and the investment of the proceeds for the benefit of the Cherokee school fund, they were not sold and the Cherokee Nation has derived no benefit whatever from the cession. It seems clear that as these three tracts of land were a part of the consideration of the treaty of 1819, the Cherokee Nation should be paid their value at the time the treaty was made, with interest until the time of payment. The one-mile-square tracts contained 640 acres each. From the field notes of Col. Martin, on file in the Indian Office, it appears that the small tract contained, substantially, 420 acres. The total acreage of the three tracts was therefore 1,700 acres, which, at $1.25 per acre, would amount to $2,125, which sum, with interest from February 27, 1819, to the time of payment, is due to the Cherokee Nation.

TREATY OF 1828;

The treaty of 1828* was made with the Western Cherokees, who, under the provisions of the treaties of 1817 and 1819, had emigrated to Arkansas. It provided for the removal of that branch of the tribe from within the limits of Arkansas to substantially the present location of the Cherokee Nation in the Indian Territory. The Cherokee Nation east was not a party to the treaty and acquired no rights under it any further than that the Government agreed in the 8th article to remove and subsist for one year after arrival in the Indian Territory any Eastern Cherokees who desired to join that portion of the tribe which had emigrated and were then known as "Western Cherokees," and in addition to pay the sum of $12.50 to each emigrant. Under article 5 of the treaty, the United States agreed to pay the Western Cherokees the sum of $50,000 as the difference in value between the lands in Arkansas and the lands in the Indian Territory; an annuity of $2,000 per year for three years, as indemnity for probable loss caused by the straying of stock; $8,780 for spoliations; and $2,000

*U. S. Statutes at Large, Vol. 7, page 311.

annually for ten years for educational purposes. These sums were appropriated by the act of May 24, 1828,* and were fully and properly paid to the Western Cherokees.

TREATY OF 1833;

The treaty of February 14, 1833,† is practically a duplication of the treaty of 1828. In describing the boundaries of the land to be occupied by the Cherokees removing from Arkansas to what is now the Indian Territory, certain lands which had already been ceded to the Creek Nation, were included; and the purpose of the treaty of 1833 was to rectify this error, and to alter the boundary of the lands ceded to the Cherokees so as to exclude the Creek lands from the Cherokee grant, and to include other lands of equal area. Both of these treaties (1828 and 1833) were made with the Western Cherokees, and the Eastern Cherokees had no interest in or rights under them except as has been hereinbefore stated. The claims of the Western Cherokees arising under these and subsequent treaties were referred to the Court of Claims by the act of February 25, 1889;‡ and adjudicated by decision No. 16,599, decided November 30, 1891. This adjudication disposes of all claims which arise under the treaties of 1828 and 1833, even if the stipulations of these treaties were not faithfully performed. As a matter of fact, however, the agreements contained in these treaties were carried out and there is consequently nothing due under them.

TREATY OF 1835;

Subsequent to the treaty of 1828 and prior to the treaty of 1835,§ almost continuous efforts were made to induce the Cherokee people to emigrate to the Indian Territory. In 1802‖ a compact was entered into between the United States and the State of Georgia, whereby the latter ceded to the former all of its lands without its present boundaries, and the United States agreed to extinguish all the Indian titles within its present limits as soon as it could be reasonably and peaceably done. It was to carry out this agreement with the State of Georgia that numerous propositions were made to the Cherokee Nation to induce its emigration. In the meantime, the white population of Georgia was rapidly increasing and serious encroachments were being made upon the territory reserved to the Cherokees by the treaty of 1819. In addition to this individual encroachment the Legislature of Georgia had assumed to extend the jurisdiction of the State over the Cherokee Nation, and had enacted legislation tending to the destruction of the Cherokee national authority.

* U. S. Statutes at Large, Vol. 4, page 300.
† U. S. Statutes at Large, Vol. 7, page 414.
‡ U. S. Statutes at Large, Vol. 25, page 694.
§ U. S. Statutes at Large, Vol. 7, page 478.
‖ The Public Domain, page 80.

Under these circumstances a very small fraction of the Cherokee Nation, appreciating the impossibility of the continuance of Cherokee occupation of lands within the State of Georgia, made the treaty of New Echota, providing for the surrender of its eastern possessions and the emigration of the Nation west of the Mississippi. This treaty was repudiated by a very large majority of the Cherokee Nation who refused to emigrate under its provisions, and various propositions were made, both by the Principal Chief of the Nation, John Ross, and by representatives of the United States, looking to a satisfactory adjustment of the controversy. Nothing was accomplished under this treaty until the fall of the year 1837, except that those Cherokees in sympathy with the purposes of the treaty were removed, or removed themselves, west of the Mississippi. In 1837 the Cherokee Nation practically accepted the provisions of the treaty and agreed to remove, and did remove, under the direction of Mr. Ross, to the Indian Territory.

It is under this treaty that the chief claim of the Cherokee Nation against the United States arises. This claim has been in dispute since the date of the treaty; and the proper construction of this instrument has been the subject of innumerable reports, memorials, petitions and opinions. It becomes of importance, therefore, to carefully examine the true intent and meaning of this treaty.

The following extracts from the treaty itself and the supplementary articles thereto* cover the points at issue, and are here extended for convenience of reference:

> ARTICLE 1. The Cherokee Nation hereby cede relinquish and convey to the United States all of the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoilations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles. But as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river" have included and made any allowance or consideration for claims for spoilations it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision and if no allowance was made for spoilations that then an additional sum of three hundred thousand dollars be allowed for the same.

Article 2nd describes the territory ceded to the Cherokee Nation, and contains the following clause:

*U. S. Statutes at Large, Vol. 7, page 488.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

This article also describes the additional quantity of land in the Territory of Kansas, known as the neutral lands and shown upon the annexed map colored yellow.

ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggagewagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided.

ARTICLE 10. The President of the United States shall invest in some safe and most productive public stocks of the country for the benefit of the whole Cherokee nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee nation west of the Mississippi the following sums as a permanent fund for the purposes hereinafter specified and pay over the net income of the same annually to such person or persons as shall be authorized or appointed by the Cherokee nation to receive the same and their receipt shall be a full discharge for the amount paid to them viz: the sum of two hundred thousand dollars in addition to the present annuities of the nation to constitute a general fund the interest of which shall be applied annually by the council of the nation to such purposes as they may deem best for the general interest of their people. The sum of fifty thousand dollars to constitute an orphans' fund the annual income of which shall be expended toward the support and education of such orphan children as are destitute of the means of subsistence. The sum of one hundred and fifty thousand dollars in addition to the present school fund of the nation shall constitute a permanent school fund, the interest of which shall

be applied annually by the council of the nation for the support of common schools and such a literary institution of a higher order as may be established in the Indian country. And in order to secure as far as possible the true and beneficial application of the orphans' and school fund the council of the Cherokee nation when required by the President of the United States shall make a report of the application of those funds and he shall at all times have the right if the funds have been misapplied to correct any abuses of them and direct the manner of their application for the purposes for which they were intended. The council of the nation may by giving two years' notice of their intention withdraw their funds by and with the consent of the President and Senate of the United States, and invest them in such manner as they may deem most proper for their interest. The United States also agree and stipulate to pay the just debts and claims against the Cherokee nation held by the citizens of the same and also the just claims of citizens of the United States for services rendered to the nation and the sum of sixty thousand dollars is appropriated for this purpose but no claims against individual persons of the nation shall be allowed and paid by the nation. The sum of three hundred thousand dollars is hereby set apart to pay and liquidate the just claims of the Cherokees upon the United States for spoliations of every kind that have not been already satisfied under former treaties.

ARTICLE 11. The Cherokee nation of Indians believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the nation; and their present school fund amounting to about fifty thousand dollars shall constitute a part of the permanent school fund of the nation.

ARTICLE 12. * * * It is also understood and agreed that the sum of one hundred thousand dollars shall be expended by the commissioners in such manner as the committee deem best for the benefit of the poorer class of Cherokees as shall remove or have removed west and are entitled to the benefits of this treaty. The same to be delivered at the Cherokee agency west as soon after the removal of the nation as possible.

ARTICLE 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, removal subsistence and debts and claims upon the Cherokee nation and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national funds; provided for in the several articles of this treaty the balance what-

ever the same may be shall be equally divided between all the people belonging to the Cherokee nation east according to the census just completed; and such Cherokees as have removed west since June 1833 who are entitled by the terms of their enrolment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east they shall also be paid for their improvements according to their approved value before their removal where fraud has not already been shown in their valuation.

SUPPLEMENTARY ARTICLES TO TREATY OF 1835.

ARTICLE 1. It is agreed that all the pre-emption rights and reservations provided for in articles 12 and 13 shall be and are hereby relinquished and declared void.

ARTICLE 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi river was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question and whereas the President is willing that this subject should be referred to the Senate for their consideration and if it was not intended by the Senate that the above-mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provision should be made therefor as might appear to the Senate to be just.

ARTICLE 3. It is therefore agreed that the sum of six hundred thousand dollars shall be and the same is hereby allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions and of the sum of three hundred thousand dollars for spoliations described in the 1st article of the above mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate and if they shall approve the same then this supplement shall remain part of the treaty.

ARTICLE 4. * * * It is also understood and agreed, that the one hundred thousand dollars appropriated in article 12

for the poorer class of Cherokees and intended as a set-off to the pre-emption rights shall now be transferred from the funds of the nation and added to the general national fund of four hundred thousand dollars so as to make said fund equal to five hundred thousand dollars.

It will be observed that by article 8 of this treaty the United States agrees and stipulates to remove the Eastern Cherokees to their new home and to subsist them one year after their arrival there. Under the 15th article of the same treaty it is provided that the residuum of the five million dollars, after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, removals, subsistence, etc., shall be distributed per capita among the Cherokees east. By article third of the supplementary articles to the same treaty an additional appropriation of $600,000 is made to include the expense of removal. The question at issue under the treaty of 1835 is: Is the expense of removal properly chargeable to the five million treaty fund?

THE INTENT OF THE TREATY OF 1835.

This treaty had its origin in an agreement made by a delegation of the Cherokee nation to submit to the Senate to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands east of the Mississippi river. Upon this submission the Senate advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river."

A question arose between the treaty parties whether, in fixing this sum "not exceeding five millions of dollars," the Senate had included and made any allowance for claims for spoliations, and it was agreed that this question should be submitted again to the Senate, and if no allowance was made for this object, that an additional sum of three hundred thousand dollars be allowed therefor. (Art. 1, Treaty of 1835.)

A further question also arose between the treaty parties whether the Senate intended the said five million dollars should include the cost of the removal of the Cherokees to the country west of the Mississippi, and the value of certain claims which certain Cherokees had against citizens of the United States, and it was agreed that this question should be referred to the Senate for its consideration, and if it was not intended that the sum of five million of dollars should include the said objects that such further provision should be made therefor as might appear to the Senate to be just. (Art. 2, supplementary articles to treaty of 1835, concluded March 1, 1836.)

It evidently was not intended by the Senate that the five million dollars should include the objects specified, inasmuch as by the third article of the supplementary articles to the treaty of 1835, duly ratified by that body, the sum of six hundred thousand dollars was al-

lowed to the Cherokees to include the expense of their removal, and all claims of every nature and description not otherwise expressly provided for, said sum to be in lieu of reservations and pre-emptions, and of the sum of three hundred thousand dollars for spoliations described in the first article of the treaty of 1835.

The suggestion referred to in the second article of the supplementary treaty of 1835, (March 1, 1836), was made in the following communication, which was signed by Senator Cuthbert and others who voted for the ratification of the treaty. The treaty upon submission to the Senate, was ratified by only one majority. It is a reasonable inference, therefore, from this communication, that if the intent of the treaty had been understood to be that the cost of the removal was to be deducted from the Five Million Fund, it would not have been ratified in its then shape, but would have been amended to conform to the understanding expressed in this note to the President:

FEBRUARY 29, 1836.

We have no hesitation in stating it to be our impression, sir, that the Senate of the United States did not intend that the allowance for spoliations or the expenses of removal should be deducted from the amount of five millions recommended to be offered to the Cherokees as the price of their property. It is also our confident opinion that the Senate will readily add six hundred thousand dollars to the sum of five millions to meet these two expenditures.

With the greatest respect, etc.

——— ———

To the PRESIDENT OF THE UNITED STATES.

The reasonable interpretation of the third article of the supplementary agreement of March 1, 1836, seems to be, therefore, that it was intended to exempt from the operation of the 15th article of the treaty of 1835, which provided that the various expenditures, allowances, and investments provided for in the several articles of the said treaty, should be deducted from the Five Million fund, the expense of removal, and the claims not otherwise expressly provided for. It apparently was the understanding of the Senate that this sum of six hundred thousand dollars would fully cover the cost of removal and these additional claims, since it provided that any surplus which might remain should be turned over and belong to the educational fund. This expectation was evidently based upon and warranted by the schedule appended to a preliminary treaty, made March 14, 1835, between Agent J. F. Schermerhorn and a Cherokee delegation headed by John Ridge.* In this schedule, which shows the amount to be deducted from the Five Million fund for national funds, improvements, etc., appear the following items:—

*H. R. Docs., Vol. 7, No. 286, p. 39, 24th Cong. 1st Session.

For removals	$255,000.
" claims & spoliations	250,000.
Aggregating	505,000.

It should be borne in mind that neither when this schedule was prepared, nor in December of the same year, when the treaty which was finally ratified was made, was the removal of the entire Cherokee people contemplated. Both treaties provided for the continued residence in the east, upon certain conditions, of Cherokees who were averse to removal. As finally ratified, the treaty of December required the removal of the entire nation, and by reason of the increased number of emigrants a larger sum than the estimate was provided.

The eighth article of the treaty of 1835 recites, "The United States also agree and stipulate to remove the Cherokees to their new homes, and to subsist them one year after their arrival there." This article was ratified without amendment. Under the agreement of submission it was competent for the Senate to declare that its intention was that the sum of five million dollars should cover all the expenditures consequent upon carrying out the provisions of the treaty, in which case the cost of removal and subsistence, as well as the other items specified, would necessarily have to be charged to, or deducted from, the five millions, as provided in the 15th article of the treaty of 1835.

The apparent conflict between the 8th and 15th articles is reasonably accounted for by the uncertainty respecting the decision of the Senate. If the Senate insisted upon the five million as the maximum sum to be paid, the 15th article would be fully operative; if, on the contrary, additional allowances were made for certain specific objects, such objects would be relieved from the operation of that article. The 8th article having been ratified without amendment, and the question submitted to the Senate in the 2nd article of the supplementary treaty having been answered substantially in the negative, by the further allowance of six hundred thousand dollars, "to include the expense o ftheir removal," the conclusion seems unavoidable that the intention of the Senate was that the five million dollars allowance should not be charged with the expenses of removal. The same reasoning would apply equally to the cost of subsistence, and was subsequently adopted by the government, by the re-payment to the Cherokees of the amount expended for this purpose which had been charged to and deducted from the treaty fund.

Prior to the general migration of the Cherokee Nation in the late fall and winter of 1838, the sum of $600,000 appropriated by the supplementary articles of the treaty of 1835, had been practically exhausted. No further appropriation, however, would have been necessary if it had been the original understanding that the expense of removal and subsistence was to be charged to the treaty fund, there then remaining of that fund more than sufficient to meet that

expense. On the 12th of June, 1838, a further appropriation was made as follows:

In full of all objects specified in 3d article of supplementary articles of treaty of 1835 with Cherokees, and for the further object of aiding in subsistence of said Indians for one year after removal west; Provided, That no part of said money shall be deducted from the five million stipulated to be paid said tribe by said treaty	$1,047,067.00

This appropriation was based upon the following estimates submitted by the Secretary of War to the Speaker of the House of Representatives, March 25, 1838:*

In compliance with the resolution of the House of Representatives of the 23d instant, requiring a statement of the amount that will be required for the additional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

The payment of the expenses of removing the remaining Cherokees, estimated at 15,840, at $30 a head..	$475,200.00	
Amount applicable to that purpose.....	39,300.00	
Balance to be provided for.....		435,900.00
If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival in the west, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated to be paid by treaty, viz: $33.33 a head.....		611,167.00
		1,047,067.00

It is evident that the estimate of $30 per head as the cost of removal was not based upon full knowledge of the actual expense, since it appears that the expenditure per head for the removal of those who emigrated voluntarily, prior to the general movement of the nation under the conduct of John Ross, was $61.70; and no reason appears for the belief that future removals could be accomplished for a less sum.

The great bulk of the Cherokee Nation was averse to removal. The voluntary emigration covered a very small fraction of its people. A large majority of the tribe had been gathered in camps and were held under military guard, and preparations were being made for immediate removal under the escort of the United States troops. There was great danger of an outbreak, and it seemed probable that

*Vol. 10, Ex. Docs. No. 410, 25th Cong. 2nd Session.

the attempt to complete the forcible removal would lead to open hostilities and perhaps involve a serious war.

Under these circumstances, having become convinced that ultimate removal was inevitable, Mr. John Ross submitted a proposition to General Scott, offering to undertake the removal at a cost of $65.88 per head.

General Scott considered the estimate too high and asked Mr. Ross to reconsider it. Upon further examination, Mr. Ross replied to Gen. Scott that, so far from reducing the estimate, a slight increase would be necessary for furnishing certain articles which had been omitted from the original estimate. Gen. Scott, being under the impression that the cost of removal was to be paid from the treaty fund, acceded to the final proposition, and the removal was begun. The journey covered a distance of about 800 miles, and was based upon the assumption that it could be accomplished in 80 days. As a matter of fact the emigration occupied 125½ days on the average, and involved a cost of a fraction over $103.25 per head. It does not appear that the time occupied in the journey was unnecessarily extended by the parties having charge of the emigration; on the contrary, it does appear, from the statement of Gen. Scott, that the season and the roads were exceedingly bad and the difficulty and cost of procuring provisions very great.

Under the voluntary emigration there had been complaints respecting the sufficiency and quality of rations and the facilities for transportation and the care of the sick, and it was the intention of Mr. Ross to furnish an extra number of wagons and additional care for the sick and infirm. It was also to be expected that an emigration conducted by Mr. Ross would occupy a longer time than if conducted under the escort of the United States troops. Even under the better conditions of the Ross emigration, so far as facilities were concerned, the process of removal was exceedingly tedious and disastrous, as is emphatically shown by the fact that there were over 600 deaths in the 12 detachments during the journey.

The total amount paid John Ross for the removal was $1,357,745.86. The first payments comprised the sum of $776,398.98, leaving an unpaid balance of $581,346.88. The payment of this sum was for some time refused, but finally, after a very lenghty correspondence and discussion and re-examination of the case, the amount was allowed by direction of President Tyler. It is to be borne in mind that if the emigration had been undertaken under the conduct of the United States Army it would not only have involved a very great expense for military escort, but the emigrants would necessarily have to be kept under very strict guard to avoid desertion. Even under the voluntary emigration the desertions ranged from 1 to 18 per cent, and it is questionable whether but for the agreement made with Mr. John Ross, the government would have been able to safely deliver a substantial portion of the Cherokee Nation in the Indian Territory. Under these circumstances, considering the difficulties arising from an inclement season, bad roads, snow

and ice, the fact shown by the number of deaths, that a very large number of the emigrants were sick and infirm, it cannot reasonably be claimed that the expense of removal was seriously exaggerated, while on the other hand, it seems clear from the history of the case, that the removal was accomplished with a much less expense to the United States than if it had been involuntary, under the direction of Gen. Scott.

It is unquestionably true that Mr. John Ross and his brother both realized a substantial profit from the contract for removal, but it nowhere appears that either they or the members of the Nation at large understood, or had any reason to understand, that the arrangement which had been made with the Secretary of War in the direct line of the several treaty provisions was to be carried out at the expense of the treaty fund and to be deducted from the per capita amount which had been promised in the various negotiations which preceded the final ratification of the treaty.*

THE UNDERSTANDING OF THE CHEROKEE NATION:

The Supreme Court of the United States, in their decision the case of Worcester *v.* The State of Georgia, say:

> The language used in treaties with Indians ought never to be construed to their prejudice. * * * How the words of the treaty were understood by this unlettered people (the Cherokees), rather than their actual meaning, should form the rule of construction. (6 Peters, p. 576.)

The understanding of the Cherokee people respecting this question of removal is clear. It has been agitated for several years and many propositions looking to this end had been made to them, all, with one exception, contemplating the payment of the cost of removal and subsistence by the United States.

Under the treaty of 1817, the United States agreed to pay, and did pay, the expense of the removal of the Cherokees who emigrated under that treaty. The treaty of 1828, made with the Western Cherokees, contained the following provision:

> ART. 8. And that their brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, east of the Mississippi, who may desire to remove west, shall be given, on enrolling, himself for emigration, a

*For detailed account of the transactions leading up to the treaty of 1835, and the execution of its provisions, see Sen. Docs. Vol. 2, No. 120, 25th Cong. 2d Sess. & H. R. Docs. Vol. 5, No. 1698, 27th Cong. 2d Session.

> good rifle, a Blanket, a Kettle, and five pounds of tobacco; (and to each member of his family one blanket); also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation, and support, by the way, and provisions for twelve months after their arrival at the Agency; and to each person, or head of a family, if he take along with him four persons, shall be paid immediately on his arriving at the Agency and reporting himself and his family, or followers, as emigrants and permanent settlers, in addition to the above, provided he and they shall have emigrated from within the Chartered limits of the State of Georgia, the sum of fifty dollars, and the sum in proportion to any greater or less number that may accompany him from within the aforesaid Chartered limits of the State of Georgia.

It seems to have been the opinion of the War Department as late as November 18, 1836,* that the above article was not superceded or annulled by the treaty of 1835. On that date Mr. Commissioner Harris wrote Maj. B. F. Currey, Indian Agent in the Cherokee country, as follows:

> SIR: I acknowledge the receipt of your letter of the 26th of Oct. last, and in reply, have to observe that I have taken the decision of the Secretary of War ad interim upon the claim of the Cherokees to commutation for subsistence, at $33,33 each. The Secretary decides that the commutation may be paid at the rate above stated; but at the same time declares that the allowance is made under the treaty of 1828, and not in pursuance of any stipulation of the final treaty of 1835.

The same opinion has been held in various reports to the Senate and House of Representatives from the Committee on Indian Affairs. Without quoting from them at length the following extract, from report dated February 19, 1847,† made to the Senate by Mr. Jarnigan, gives substantially the view which has been expressed in various forms in the reports referred to:

* * * * * * *

> The sole consideration stated for the five millions was "their lands and possessions east of the Mississippi river." If anything else had been intended to be included, such as claims for spoliations, subsistence, removal, &c., why was it not so stated in the treaty? It is enough to show that it is not so stated; but it is manifest that such was not the intention of the parties; for

*Senate Docs., Vol. 2, No. 120, p. 209, 25th Cong. 2nd Session.
†Senate Docs., Vol. 3, No. 157, 29th Cong. 2nd Session.

the amount of these spoliations, the expense of removal, &c., were not then known, and could not have been ascertained; and besides, there were subsisting claims upon the Government of the United States, which they were bound by the treaty to have paid. Not to pay them, or to pay them out of the funds of the Cherokees which had been fixed by the Senate as the value of their lands, was precisely the same thing.

The United States were bound by the treaty of 1828 to pay the expenses of the removal of all the Cherokees. This obligation was not released by the purchase of their lands at their appraised value. Would such a thing be pretended in a similar transaction between individuals? If all the Cherokees had removed before they ceded their lands, the United States were bound to pay the cost of removal. If the United States afterward bought the lands of the Cherokees, they were bound to pay the price at which they were appraised. The first article of the treaty recites that "the Cherokee nation hereby cede to the United States their lands, east" &c. It will be seen by the above that subsistence and removal were not included in the above article, nor was any question as to either of those items then even thought of. But the only thing pretended to be charged upon this fund was spoliations. The Senate decided that the sum of $5,000,000 was given for the lands alone, and a supplemental article giving $600,000 was added to pay for spoliations and removal, but still not including subsistence. That sum it was then thought would be sufficient to cover these charges; but it was found that it was not; and the United States, feeling that they were bound to pay these charges, again, in 1838, appropriated $1,047,000 for these objects. Both of these sums, which were added by Congress, were found inadequate to pay these various charges and the fund of five millions has been used for that purpose and others, to its exhaustion, or nearly so. They ask to be relieved from the charges for removal and subsistence. It is very clear that not until after the exhaustion of the $6,000 and the $1,047,000 did the officers of the government of the United States ever once think that the $5,000,000 was liable for these charges. Not one dollar of that fund was ever so used until then.

The following communication* from the then Secretary of War shows that his understanding was, that this fund was not liable for these charges, or else he would not have made the requisition for the sum of $1,080,000, that is to say, $1,047,000 for these purposes, and $33,000 for annuities. Congress made the appropriation at once, which shows that the opinion of that body was the same. If the five million fund was liable for these charges, how could the Secretary have said that there were no funds to meet them, when there was the five million

* See page 23.

fund? Why did Congress make this additional appropriation? The only answer which can be given is, that it was considered just under the treaty, as the Senate had said, when the subject was a second time referred to that body for its decision on this specific question, that the treaty fund of five millions was not liable to be charged with these expenses.

* * * * * * *

The treaty fund was never touched, nor was it ever pretended that it was liable for these charges, until after the appropriation made for these specific objects had been exhausted. Now it seems very clear that if the government of the United States was liable for these charges when the additional sum of $600,000 was given, and then again when the further sum of $1,047,000 was given, it is equally liable now for whatever may remain of these charges, after both of these sums have been exhausted. The magnitude of the obligation cannot be held to release the party from its fulfillment.

* * * * * * *

The committee therefore report, and recommend the adoption of the following resolutions:*

Whereas, by the treaty of the 6th of August, 1846, between the United States and the Cherokee Indians, certain questions were agreed to be submitted to the decision of the Senate;

1. *Resolved*, That, in the opinion of the Senate, whatever balance of the fund of $5,000,000 stipulated to be paid to the Cherokee nation by the treaty of the 29th December, 1835, and the subsequent additions thereto, may now be ascertained to be due to the said Cherokee nation, shall bear an interest at the rate of five per cent. per annum from the time found due until the same be paid by the United States.

2. *Resolved*, That the charge for one year's subsistence of the Cherokees, after their arrival in the west, is not a proper charge upon the fund of $5,000,000 aforesaid, but should have been paid independently of that fund, by the United States.

3. *Resolved*, That the expense of removing the Cherokees to the west should, in like manner, have been borne by the United States, and not charged to the fund of $5,000,000 aforesaid.

4. *Resolved*, That the United States will pay to the Cherokee nation the sum of $10,000 for lands guaranteed to the Cherokee nation by the treaty of Tellico, signed 25th October, 1805, and of which the said Cherokee nation was deprived by the authority of the State of Tennessee, and the further sum of $35,568 for the balance remaining unsold, by the United States, of a reservation of twelve miles square in Alabama, secured to the Cherokee nation by the treaty of 27th of February, 1819, being at the rate of 62½ cents per acre.

*There was only 13 days remaining of the session, and no action appears to have been taken upon these resolutions.

If the position taken in this report be correct, and the United States was bound, under the treaty of 1828, and notwithstanding the treaty of 1835, to remove the Cherokees to the Indian Territory, it effectually disposes of the question whether the cost of such removal was a proper charge against the treaty fund.

To return to the question of the understanding of the Cherokees respecting the treaty of 1835: Prior to the adoption of this treaty, strenuous efforts were made by the United States to secure the prompt removal to the western country of the Cherokee Nation, and various propositions were made to them looking to the conclusion of a treaty for that purpose.

In September, 1830,* Col. John Lowry made a proposition to them, in behalf of the United States, in which the United States agreed to remove the Cherokees and subsist them one year after their arrival west.

In April, 1832,† Mr. E. W. Chester, in the same behalf made another proposition, under which the United States was to remove the Cherokees to their new country, and pay the expenses of such removal, and also to provide them with subsistence for one year after removal.

In September, 1832,‡ Gov. Lumpkin, of Georgia, in the same behalf, made the Cherokees a proposition substantially similar to that made by Mr. Chester.

In March, 1833,§ a proposition was made to the Cherokees by the President, offering to pay them $2,500,000 in goods for their land, with the proviso that they should remove themselves, at their own expense, which proposition was rejected by the Cherokee Council.

June 19, 1834,‖ a treaty was made between John H. Eaton, on the part of the United States, and Andrew Ross, and others, on the part of the Cherokee Nation. This treaty was rejected by the Senate, the Cherokee Nation protesting against its ratification. In this treaty appears the following clause, respecting removal and subsistence:

> Fourthly. To cause emigrants to be carried to their homes, under the guidance of some faithful conductors, at the expense of the United States, and they are furthermore, to be furnished with the means of living for twelve months after their arrival.

The treaty of March 14, 1835, before referred to, was agreed upon at the city of Washington between J. F. Schermerhorn, on the part of the United States, and a delegation of the Cherokee Indians, which the President of the United States directed to be submitted to the Cherokee Nation for their consideration. Article 9, of this treaty, provides in part as follows:

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*Indian Office files, letter-book No. 7, page 347.
† " " " " " " 8, " 297.
‡ " " " " " " 9, " 218.
§ " " " " " " 10, " 18 & 110.
‖H. R. Docs., Vol. 7, No. 286, p. 133, 24th Cong. 1st Session.

The United States also agree and stipulate to remove the Cherokees to their new homes, and to subsist them one year after arrival there, and that a sufficient number of steam boats and baggage-wagons shall be furnished them to remove them comfortably, and so as not to endanger their health; and that a physician well supplied with medicines, shall accompany each detachment of emigrants removed by the Government. They shall also be furnished with blankets, kettles, and rifles, as stipulated in the treaty of 1828. The blankets shall be delivered before their removal, and the kettles and rifles after their removal, in their new country. Such persons and families as, in the opinion of the emigrating agent, are capable of subsisting and removing themselves, shall be permitted to do so; and they shall be allowed in full for all claims for the same, twenty-five dollars for each member of the family, slaves excepted, for whom (those not owned in the nation) they shall be allowed eighteen dollars each; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents, if they prefer it. And, in order to encourage immediate removal, and with a view to benefitting the poorer class of their people, the United States agree and promise to pay each member of the Cherokee nation one hundred and fifty dollars on his removal, at the Cherokee agency west, provided they enrol and remove within one year from ratification of this treaty; and one hundred dollars to each person that removes within two years;

This treaty provided for the payment of $4,500,000 with an additional quantity of land west valued at $50,000, making a total payment of $5,000,000 from which the payments for removal, subsistence, improvements and ferries, and all other expenditures were to be deducted. Forming a part of article 18 is the following schedule, containing the estimate for carrying into effect the several stipulations of the treaty:

For Removal	$255,000.00
Subsistence	400,000.00
Improvements and ferries	1,000,000.00
Claims and spoliations	250,000.00
Domestic animals	10,000.00
National debts	60,000.00
Public buildings	30,000.00
Printing press, etc	5,000.00
Blankets	36,000.00
Rifles	37,000.00
Kettles	7,000.00
Per capita allowance	1,800,000.00
General fund	400,000.00
School fund	160,000.00
Orphan's fund	50,000.00
Additional territory	500,000.00
	5,000,000.00

This treaty was submitted to the Cherokee people at a general council at Red Clay on the 23rd day of October, 1835. A letter from President Jackson was read and translated to the council, in which he said:*

I shall in the course of a short time, appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you, more fully, my views, and the nature of the stipulations which are offered to you.

These stipulations provide:

1st. For an addition to the country already assigned to you west of the Mississippi, and for the conveyance of the whole of it, by patent, in fee simple. And also for the security of the necessary political rights, and for preventing white persons from trespassing upon you.

2d. For the payment of the full value to each individual of his possessions in Georgia, Alabama, North Carolina and Tennessee.

3d. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of one hundred and fifty dollars to each person.

4th. For the usual supply of rifles, blankets and kettles.

5th. For the investment of the sum of four hundred thousand dollars, in order to secure a permanent annuity.

6th. For adequate provision for schools, agricultural instruments, domestic animals, missionary establishments, the support of orphans, etc.

7th. For the payment of claims.

8th. For granting pensions to such of your people as have been disabled in the service of the United States.

These are the general provisions contained in the arrangement. But there are many other details favorable to you which I do not stop here to enumerate, as they will be placed before you in the arrangement itself. Their total amount is four millions five hundred thousand dollars, which, added to the sum of five hundred thousand dollars, estimated as the value of the additional land granted you, makes five millions of dollars; a sum, which, if equally divided among all your people east of the Mississippi,—estimating them at ten thousand, which I believe is their full number, would give five hundred dollars to every man, woman and child in your nation. There are few separate communities, whose property, if divided, would give to the persons composing them such an amount.

Mr. Schermerhorn also said, respecting the pecuniary benefits to result from this treaty,† after reciting the smaller advantages:

*H. R. Docs., Vol. 7, No. 286, page 41, 24th Cong., 1st session.
†Senate Docs., Vol. 2, No. 120, page 458, 25th Congress, 1st session.

> The United States will also pay $150 per head to every Cherokee who enrolls and removes the first year, and $100 to those who remove the second year after the ratification of the treaty; but no pay of this kind will be made to those who remove after two years. This is truly a provision for the poor of the Nation. The wealth of the rich men consists in their lands, improvements and negroes, but the poor men's riches are his women and children. A poor man, if he has ten children, if he removes the first year, will get when he arrives at the west of the Mississippi, $1,500; and the same proportion if his family are larger or smaller.

It is to be noted that both President Jackson and the agent, Mr. Schermerhorn, lay great stress upon the amount to be paid to the individual Cherokees under the per capita division of the residuum of the treaty fund. The amount to be divided, as shown by the schedule, was $1,800,000. It was this consideration which induced the Cherokees to consent to removal. But for the promise that they should receive, and the expectation of receiving, a substantial sum in money, they would not have accepted the treaty of 1835, and their removal could have been accomplished only by military force, and at great expense. It is plain that neither President, agent, nor Cherokees could have contemplated that a larger sum than shown in the schedule should be deducted from the Five Million Fund, inasmuch as a greater deduction would have rendered impossible such a per capita allowance as was promised by the representatives of the United States and expected by the tribe.

This preliminary treaty failed of ratification, and the final treaty of December 29, 1835, was made, substantially upon the basis of the former treaty, but containing the submission to the Senate, whether removal and spoliations were included in the Five Million Fund, which was answered by the additional appropriations of six hundred thousand dollars to cover the two items which had been specifically objected to in the discussion of the former treaty, and the inclusion of which had caused its rejection by the Cherokee council.

Under the treaty of 1835, enrollment books for voluntary emigration were opened in the then Cherokee Country. Instructions as to the nature of the enrollment were sent by Acting Secretary of War C. A. Harris, to Lieut. J. Van Horne, U. S. A., dated September 12, 1837, in part as follows:

> Enrolling books must be prepared on the following plan: A memorandum, or entry, must be inserted, purporting that the subscribers assent to a treaty with the United States upon the terms heretofore offered by the President to their people. And that if no treaty should be made during the next fall, or early in the winter, then the subscribers will cede to the United States all their right and interest in Cherokee lands east of the Mississippi, upon the following conditions: that they shall receive, so fast

as Congress shall make the necessary appropriations, the ascertained value of their improvements, on their arrival west; that they shall be removed and subsisted for one year at the expense of the United States; that they shall be entitled to all such stipulations as may be hereafter made in favor of those who do not now remove, excepting so far as such stipulations may depend on the cession of rights or improvements, for which the subscribers have been previously allowed a compensation; that they shall have their full share of the three years annuity, now remaining unpaid and that they shall also be entitled to their just proportion of the Cherokee school reservation under the treaty of 1819.

Here again appears the statement "that they shall be removed and subsisted for one year at the expense of the United States." Up to this time it had been the practice of the government to pay the cost of removal and subsistence for one year, when transferring tribes from the east to the west. The Chickasaws, Choctaws, Creeks and Seminoles were all removed upon these terms, and there was no reason why a different rule should govern the removal of the Cherokees. All of these tribes were neighbors of the Cherokees, who were generally informed of the circumstances and terms of their removal.

Still, further, on the 18th day of May, 1838,* Mr. Poinsett, then Secretary of War, in writing to Mr. John Ross respecting the removal, said:

> If it be desired by the Cherokee Nation, that their own agents should have charge of their emigration, their wishes will be complied with, and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect. With regard to the expense of this operation which you ask may be defrayed by the United States, in the opinion of the undersigned, the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made of Congress.

And, also, under date of June 1, 1838,† in explaining to General Scott, then in command in the Cherokee country why the negotiation for the Ross removal had not been effected through him, said:

> No new treaty has been made, nor propositions for a treaty entertained; but it is proposed to make such allowances to the Cherokees as it is believed were intended originally by the Senate.

The understanding of this treaty by the treaty party, with whom it was made, is shown by the following statement contained in their

*Indian Office files, letter-book No. 24, page 222.
†H. R. Docs., Vol. 11, No. 453, p. 3, 25th Cong. 2nd Session.

memorial to the United States government, dated April 13, 1844.* It will be observed that the amount to be distributed per capita is increased over that contained in the schedule forming a part of the preliminary treaty by reason of the additional appropriations of $600,000 and $1,047,067, but not by the aggregate of those sums, as the items to be deducted are also increased. This statement is here included merely to show the general understanding which the parties to the treaty had respecting the individual benefits to be derived from the per capita division of a very large sum:

> The number of persons of the Cherokee Nation, according to the census of 1835, including whites and blacks and North Carolina Indians, was 16,743. Thus at $20 per head, the United States would be entitled to a credit of $334,860 for removal. For subsistence $558,044.14.

The account current will therefore stand thus:

The United States in account with the Cherokees, under the treaty of 1835.

DR.

To this amount appropriated under the 1st article of the treaty including amount retained for land	$5,000,000.00
This amount appropriated under the 3d supplemental article of the treaty	600,000.00
This amount of additional appropriation for objects specified under the 3d supplemental article, and for subsistence	1,047,067.00
Total	6,647,067.00

*H. R. Docs., Vol. 5, No. 234, 28th Cong. 1st Session.

The United States in account with the Cherokees, under the treaty of 1835—Continued.

CR.

By this amount paid for improvements under the 9th article of the treaty		$1,647,917.33	
This amount paid for spoliations under the 9th article and 3d supplemental art. of the treaty		570,511.67	
This amount allowed for removal, estimating numbers according to census of 1835, at $20 each		334,860.00	
This amount allowed for subsistence upon the same basis, at $33.33 each		558,044.00	
This amount paid for debts of the Cherokee Nation, as per 10th art.		50,000.00	
This amount paid for lands not appropriated, but withheld		500,000.00	
Pd. for national funds, 10th art	$200,000		
Pd. for education funds, 10th art	150,000		
Pd. for orphan's funds, 10th art	50,000		
		400,000.00	
Added to education fund, 4th supplemental article		100,000.00	
			$4,171,333.00
Leaving a balance against the United States			2,475,734.00

Or $147.86 each.

The "application for such further sum as may be required for this purpose" was made to Congress, and in response thereto the appropriation of $1,047,067 was made. The cost of removal and subsistence proved to be very much larger than was anticipated and provided for in this appropriation. The excess of cost of subsistence over the amount appropriated has been refunded to the Cherokee Nation; but upon the assumption that the United States was to pay the expense of removal there is due the Cherokee fund the sum of $1,111,284.70, as per the following statement:

Total expense of removal and subsistence		$2,952,195.26
To which the United States contributed the difference between the amount actually paid for spoliations ($264,894.09) and $600,000 appropriated July 2, 1836	$335,105.91	
Amount appropriated by act of June 12, 1838	1,047,067.00	
Amount appropriated by act of September 30, 1850	189,422.76	
Part of amount appropriated by act of February 27, 1851, being sums paid to agents of the United States, originally charged to treaty fund and then reimbused	99,999.42	
		1,668,595.09
Charged to treaty fund		1,283,601.17
Of which there was expended for subsistence, after the expiration of one year, properly chargeable to the Cherokee fund		172,316.47
Leaving balance due the Cherokee Nation		1,111,284.70

Eliminating wholly from the account the appropriations for, and the expenditures on account of removal and subsistence, and deducting from the $5,000,000 fund the items properly chargeable thereto, the statement would be as follows:

Due to Cherokee Nation for lands and possessions east of Mississippi river		$5,000,000.00
Appropriation for spoliations by supplemental treaty Mar. 1st, 1836, being so much of $600,000 as actually paid for this purpose		264,894.09
		5,264,894.09
Deduct:		
For spoliations	$264,894.09	
For improvements	1,540,572.27	
For ferries	159,572.12	
For debts and claims upon the Cherokee Nation	101,348.31	
For the additional quantity of land ceded to the Nation	500,000.00	
For amount invested as the general fund of the nation	500,880.00	

For subsistence furnished after expiration of one year under agreement that it should be charged to treaty fund.....	172,316.47	3,239,583.26
		2,025,310.83
Per capita distribution.....		914,026.13
Leaving balance due as shown on preceding page		1,111,284.70

The above amounts of expenditure are taken from a joint report of the Second Auditor and Second Comptroller, made December 3, 1849,* in accordance with a resolution of Congress, passed August 7, 1848.† The vouchers covering these disbursements were again carefully examined and a report made in 1884, by Mr. Jesse Arnold, of the Second Auditor's office, for the use of the Court of Claims in the suit of the Western Cherokees against the United States. The result of the examination of over 30,000 vouchers was an exact confirmation of the report of 1849.

Although under the treaty of 1835, the removal of the Cherokee nation was practically completed in 1838, no steps were taken for several years looking to carrying out the provisions of the treaty. Meantime the nation was divided into three branches, the "Old Settler" or Western Cherokees, comprising those who had emigrated under the treaties of 1817 and 1819; the treaty party composed of a small proportion of the nation who had been parties to the treaty of 1835 and who had removed themselves or been removed by the government prior to 1837–8, and, lastly, the government or Ross party, comprising the great majority of the nation who had repudiated the treaty of 1835, but had finally yielded to the necessities of the situation so far as to remove under the direction of John Ross. Each of these three parties had a grievance,, and each was opposed to both of the others, for reasons growing out of its particular relations to the making and execution of the treaty. The Old Settlers were aggrieved because, having by the session of their lands in Arkansas acquired an exclusive right to the lands of the Indian Territory, there was precipitated upon them a great number of Eastern Cherokees, comprising both the treaty and government parties, without any provision being made for compensation to them for the restricted use of the western territory, consequent upon such an access of population. The treaty party felt aggrieved because after having made the treaty with the United States government, the United States had practically withdrawn its support from them by reason of which they were subjected to harsh and vindictive legisla-

*Sen. Ex. Doc. Vol. 6, 31st Cong. 1st Session.
†U. S. Statutes at Large, Vol. 9, No. 6, page 339.

tion by the government party, which, upon its arrival in the western territory, by sheer force of numbers, assumed to control and did control the affairs of the entire Cherokee Nation.

The government party continued to regard its forced removal as an injustice and hardship, and this feeling was aggravated by the failure of the government of the United States to carry out the provisions of the treaty of 1835. Under these circumstances the nation was in a condition of continuous ferment; several of the leading men of the government party and the treaty party were murdered, and it was contemplated by the latter branch of the nation to remove wholly without the limits of the Indian Territory. Finally, with a view to preserving harmony, delegations representing the three branches were brought to Washington, and the result of protracted negotiations and numerous conversations with the different delegations was that the treaty of August 6, 1846,* was finally concluded.

It provided for an examination and payment to each section of the nation of its just claims arising out of the treaty of 1835, and the collateral circumstances connected therewith. Under article 3, it was provided that certain claims which had been allowed by the several boards of commissioners appointed under the treaty of 1835 to estimate the value of improvements, spoliations, etc., which had been charged to those items under the names of rents and dispossessions and reservations, should be reimbursed to the treaty fund.

These amounts, as will presently appear, were fully restored to the treaty fund, and there is consequently no just claim against the United States by reason of the charges alluded to in the 3rd article. The same article provided further that the expenses of making the treaty of New Echota, which it states were also paid out of the fund, should likewise be reimbursed. This statement was an error. The expense of making the treaty of New Echota, amounting to $37,212, was paid by direct appropriation made July 2, 1836, and was never charged to the national fund.

Article 4, of the treaty of 1846, provided for a settlement with the Old Settlers or Western Cherokees, and, under this article, there was paid to them, practically as a consideration for the lands which were occupied by the Eastern Cherokees on their migration to the west, but nominally as one-third of the residuum of the treaty fund, based upon the assumption that the Western Cherokees comprised one-third of the entire nation, the sum of $532,896.90.† Still later, as has been stated, the Western Cherokees were authorized‡ to bring a suit for additional claims in the Court of Claims, under which adjudication an additional sum of $224,972.68, with interest, and an allowance of $4,179.26, being the value of certain lands in Arkansas, was awarded them, the total award amounting to $830,578.64. The sum of $224,972.68 was reduced by the Supreme Court to $212,376.94, and the judgment affirmed.§

*U. S. Statutes at Large, Vol. 9, page 871.
†Act of Sept. 30, 1850, making appropriation for Indian Dept.
‡Act of Feby. 25, 1889, 25th Stats. page 694.
§U. S. Reports 148, page 427.

Under the 6th article it was provided that $115,000 should be paid the treaty party by reason of their losses and expenses incurred in consequence of the treaty of 1835, of which $5,000 was paid to the heirs of Major Ridge; $5,000 to the heirs of John Ridge; $5,000 to the heirs of Elias Boudinot, $25,000 to the delegation representing the treaty party in making the treaty of 1846, the balance of $75,000 to be distributed among the individual members of the treaty party. This amount of $115,000 was appropriated by the act of March 1, 1847, and was duly distributed to those entitled to share in the distribution.

Article 9 of this treaty provides for a settlement of the claims of the nation arising out of the distributions under the treaty of 1835, and is as follows:

> ARTICLE IX. The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee nation of Indians, for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation and, also, all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto.

This article provides substantially, as will be seen, for a settlement with the Cherokee Nation upon the basis of the treaty of 1835, and for the deduction from the sum of $6,647,067 of the charges properly to be made against it under the terms of that treaty, and the distribution per capita of the residuum. It is evident from the use of the word "properly" in this section that it was not the intention to increase or enlarge the deductions which were to be made from the treaty fund, either in numbers or in character. Whatever was properly chargeable under the 15th article of the treaty of 1835, was also chargeable under the 9th article of the treaty of 1846, but nothing more. In pursuance of this article a resolution was passed by Congress on August 7, 1848, instructing the proper accounting officers of the Treasury to render a statement of the balance found due the Cherokee Nation, which was transmitted to Congress December 3, 1849, and was as follows:

For Improvements		$1,540,372.27
" ferries		150,372.72
" spoliations		264,804.09
" removal and subsistence and commutation therefor, including $2,765.84 expended for goods for the poorer Cherokees, under the 15th art. of treaty of 1835, as follows:		
Removal, subsistence & commutation	$2,823,192.93	
Physicians, matrons, medicines, hospital stores, etc...	32,003.91	
Superintendents, clerks, interpreters, disbursing, issuing and enrolling agents, conductors and contingencies	99,999.42	
		2,952,196.26
For debts and claims upon the Cherokee Nation:		
National debts (10th Art.)..	18,062.86	
Claims of U. S. citizens (10th Art.)	61,073.49	
Cherokee Committee (12th Art.)	22,212.76	
		101,348.31
For the additional quantity of land ceded to the nation		500,000.00
For amount invested as the general fund of the nation		500,880.00
		6,019,463.65
Appropriation July 2, 1836	$5,000,000.00	
" " " "	600,000.00	
" June 12, 1838	1,047,067.00	
		$6,647,067.00
Deducting above amount		6,019,463.65
Gives balance found due by Second Auditor and Second Comptroller		627,603.35

The sum of $96,999.42 shown in the above account was considered by Congress not to be a proper charge against the $6,647,067, and was appropriated and restored to the said fund by the Act of February 27, 1851.*

In the total amount of $2,952,196.26, for removal, subsistence, etc.,

*U. S. Statutes at Large, Vol. 14, page 572.

there was included the amount of $189,422.76, which was the sum paid for subsistence in excess of the amount appropriated by the act of June 12, 1838, for this specific purpose. This amount was also considered an improper charge against the treaty funds, and was appropriated and restored to the said funds by act of September 30, 1850.*

The total amount for distribution per capita, therefore, was:†

Amount found due by Treasury officials		$627,603.95
Additional appropriations by Congress, as above		96,999.42
Making total sum for per capita distribution		914,026.13
Of this sum there was sent to John Drennan, Superintendent of Indian Affairs, for distribution to the Eastern Cherokees, then in the west, from the appropriation of September 30, 1850	$164,523.66	
And to Alfred Chapman, for distribution to the Cherokees still remaining in the east but entitled to participate in the distribution	24,627.58	189,151.24
And of the sum of 724,603.37 appropriated by act of February 27, 1851, there was remitted to Mr. Drennan for the same purpose as the former remittance to him	629,379.47	
And to Mr. Chapman for the same as the prior remittance to him	95,223.90	724,603.37
There was retained on account of payments already made to individual Cherokees (exclusive of interest, which amounted to $170.61)		271.52
A total disbursement of		914,026.13
There was also distributed as interest upon the above sums:		
Upon the sum paid by Superintendent Drennan		514,459.02
And upon the sum distributed by Mr. Chapman		77,683.02
Total per capita distribution		1,506,168.17
Add interest item, as above		170.61
Total principal and interest appropriated		1,506,338.78

*U. S. Statutes at Large, Vol. 14, page 556.
†Indian Office files, Ledger No. 9, pages 177 and 199.

The total number of Cherokees participating in this distribution was 16,231, of whom 14,098 were Cherokees in the west and 2,133 remained east. The per capita amount was $92.79.

Figuring upon the basis stated in the 9th article of the treaty of 1846, and following the Auditor's and Comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067, the excess of payments over the amounts appropriated by the United States for that purpose, the true statement of the accounts is as follows:

For Improvements	$1,540,572.27
" ferries	159,572.12
" spoliations	264,894.09
" removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items: { $335,105.91 / 1,047,067.00 }	1,382,172.91
For debts and claims upon the Cherokee Nation	101,348.31
For the additional quantity of land ceded to the nation	500,000.00
For amount invested as the general fund of the nation	500,880.00
For subsistence furnished after expiration of one year under agreement that it should be charged to treaty fund	172,316.47
	4,621,756.17
For lands and possessions	5,000,000.00
" spoliations	264,894.09
Balance of $500,000 applicable to removal	335,105.91
Appropriation June 12, 1838	1,047,067.00
	6,647,067.00
From which deduct charges as above	4,621,756.17
Balance to be distributed per capita	2,025,310.83
Deduct amount actually distributed, as already explained	914,026.13
Balance due	1,111,284.70

Under article 8 of the treaty of 1846, the sum of $20,000 was also appropriated in lieu of all claims of the Cherokee Nation, as a nation, prior to the treaty of 1835, except all lands reserved by the treaties heretofore made for school funds. This amount was appropriated by act of March 1, 1847, and was duly paid to the Cherokee nation. The several appropriations which have been made cover the liability of

the United States to the Cherokee Nation under the treaty of 1846, treating the above sum of $1,111,284.70 as arising under the treaty of 1835.

TREATIES OF 1866 & 1868.

The treaty of 1866* grew out of the fact that the nation had been divided during the war and until the time of making the said treaty. The great majority of the Cherokee Nation was loyal, but a substantial percentage sympathized with the Confederacy and furnished troops to the Confederate cause. The country had been over-run by both Federal and Confederate troops, and the improvements which existed at the beginning of the war had practically been wiped out of existence. The Cherokee Nation was, therefore, in an exceedingly impoverished condition while the feuds growing out of the war still continued.

The object of the treaty was to harmonize the differences between the northern and southern sympathizing elements, and also to restore the tribe to its former condition. It provided for general amnesty; for the repeal of certain confiscation laws which had been directed against that section of the tribe which had allied itself with the Confederacy; for the freedom of the slaves and for the reorganization of the government.

Under article 15, it was provided that the United States might settle any civilized Indians, friendly with the Cherokees and adjacent tribes within the Cherokee country, on the unoccupied lands east of the 98th meridian west longitude. Any tribe so settled, not retaining its tribal organization, was required to pay into the Cherokee national fund a sum of money, bearing the proportion to the national fund which the number of the tribe so settled bore to the entire number of the Cherokee Nation. If the tribe so settled east of the 98th meridian desired to preserve its tribal organization, it was to contribute in like manner to the national fund, and, in addition, pay for the lands allotted to it, at a price to be agreed upon between such tribe and the Cherokees, the President of the United States having the right to fix a price in case of disagreement.

Under article 16, the United States had the privilege of settling friendly Indians in any part of the Cherokee Country west of the 98th meridian, and to allot such tribes a quantity of land not exceeding 160 acres to each person, to be paid for at an agreed price, subject to the decision of the President, as before stated, in case of disagreement.

By article 17, the Cherokee Nation ceded in trust to the United States, the tract of land in the State of Kansas which had been ceded to it by the treaty of December 29, 1835, known as the "neutral" lands, and shown upon the second map appended hereto; also a strip of land within the State of Kansas, shown upon the same map and marked "Cherokee Strip." These lands were to be surveyed and sold

*U. S. Statutes at Large, Vol. 14, page 799.

in the same manner as the public lands of the United States are sold, and the proceeds distributed among the General, School, and Orphan funds of the Nation, in the proportion of 50, 35, and 15 per cent respectively. The Secretary of the Interior was authorized to pay the drafts of the nation to an amount not to exceed $150,000, out of the funds belonging to the nation.

Under article 29, as amended, the Secretary of the Interior was also authorized to pay the reasonable cost and expenses of the delegates who made the treaty, such payments to be reimbursed out of the proceeds of the sales of the "neutral" lands in Kansas.

These provisions cover the treaty of 1866, so far as it comes within the scope of this accounting between the United States and the Cherokee Nation.

The treaty of 1868* was practically an addition or supplement to the treaty of 1866, whereby the Cherokee Nation ratified an agreement which had been entered into by the Secretary of the Interior and Mr. James F. Joy, for the purchase by the latter of the entire unoccupied portion of the "neutral" lands, and for the method of payment.

Under the treaty of 1866, by virtue of an agreement made between the Delawares and Cherokees, dated April 8, 1867, the former nation was located in the Cherokee country east of the 96th meridian, and became incorporated with the Cherokee Nation. The number of Delawares was 985, and the Cherokees 13,573, and the ratio which one bore to the other was one to thirteen seventy-eight one hundredths, which ratio formed the basis upon which was determined the amount to be paid to the Cherokees by the Delawares for an equal interest in the national fund of the Cherokees, viz: $678,000 and $1,000,000, the estimated value of the neutral lands ceded by the 17th article of the Cherokee treaty of July 19, 1866.

The amount of land purchased by the Delawares from the Cherokees, under their agreement, was 157,600 acres, which, at $1.00 per acre, aggregated the sum of $157,600, and the amount paid to the Cherokee Nation for an interest in national funds, $121,824.28 aggregating the sum of $279,424.28.

The funds transferred were as follows, viz:

Amount of nonpaying bonds of several southern States, transferred at par as per agreement	$32,000.00
Amount of paying stocks of the State of Missouri	2,000.00
U. S. bonds issued to Union Pacific R. Co: Eastern Division, transferred at market rates, $1.06⅜	245,424.28
Total	279,424.28

These funds were transferred to the credit of the Cherokees, May 13, 1869.

*U. S. Statutes at Large, Vol. 16, page 727.

Under the same treaty a tract of land west of the 96th meridian, and extending as far as the Arkansas river, was sold to the Osage and Kansas Indians, the respective tracts occupied by each being shown upon the accompany map and marked numbers 1 and 2. The amount received by the Cherokee Nation and the disposition thereof, is shown in the following statement:

To amount transferred from sales of Osage lands, in payment for 1,566,784 acres of land purchased by the Osages, per act of March 3, 1873		$1,096,748.80
By amount set apart for the benefit of an orphan institution per act of February 14, 1873	20,000.00	
By amount set apart for the establishment of a literary institution, per act of Feb. 14, 1873	75,000.00	
By amount set apart and invested in United States stocks for the orphan fund, per act of February 14, 1873	80,000.00	
Per capita distribution, act March 3, 1875	200,000.00	
By balance at interest 5 per centum per annum	721,748.80	
		1,096,748.80

$80,000 of the above funds were invested in United States stocks, the face value of which is $71,505.41, and the same were added to the orphan fund, per act of February 14, 1873. The $95,000 set apart by the Act of February 14, 1873, for the benefit of an orphan institution and the establishment of a literary institution was remitted to John B. Jones, Indian Agent, on the 27th of April, 1874.

In like manner, under the same treaty, the Shawnee Indians were incorporated with the Cherokee Nation, under an agreement between the Shawnees and Cherokees, dated June 7, 1869. There were transferred from the Shawnee to the Cherokee funds, as part consideration of the agreement, bonds amounting to $44,726.62, which the Cherokees agree to receive at their original cost, $50,000. There were also transferred to the Cherokees the following Shawnee treaty funds:

Permanent annuity for educational purposes, under treaty of August 3, 1795		$1,000.00
Permanent annuity for educational purposes, under treaty of September 29, 1817	2,000.00	
Interest on $40,000 for educational purposes, under treaties of August 3, 1795, and May 10, 1854	2,000.00	
		5,000.00

The cash value of these annuities, carrying interest at 5% is $100,000, and the interest has since been annually appropriated and paid to the Cherokee Nation. The principal sum of $100,000 has not

been added to the Cherokee funds and remains simply as a paper credit. There seems to be no good reason why this fund should be treated differently from the other funds belonging to the Cherokee Nation, and it is, therefore, found that under this agreement, and treaty of 1866, the Cherokee Nation is entitled to have carried to its credit upon the books of the Treasury the sum of $100,000.

In like manner the Ponca Indians were located west of the Arkansas river, upon the tract shown in the accompanying map and marked No. 4, the consideration being $48,389.46, which sum is included in the amount held in trust by the United States for the Cherokees in lieu of investment, bearing interest at the rate of 5% per annum.

Under the same treaty, the Nez Perces, Otoes & Missourias, and Pawnees were located upon the tracts shown upon the accompanying map, marked Nos. 3, 5 and 6 respectively. The consideration for this land consisted in an appropriation of $300,000 under act of March 3, 1883, to pay the Cherokee Nation for the lands west of the Arkansas river, which sum was to be expended as the acts of the Cherokee legislature directed; provided, that the Cherokee Nation, through its proper authorities, should execute conveyances satisfactory to the Secretary of the Interior to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, and Otoes & Missourias and Osages now occupying said tracts as they respectively occupied the same before the payment of the said sum of money. This $300,000 was deducted from the price paid for the Cherokee Outlet under the articles of the agreement concerning the cession of the Cherokee Outlet, made at Tahlequah, in the Indian Territory, on the 19th of December, A. D., 1891, as were also accounted for the appropriation of $300,000, made by the act of June 16, 1880; the amount paid for the lands assigned to the Poncas, appropriated by the Act of March 3, 1881, and $75,000 appropriated October 19, 1888, to pay certain freedmen and Delaware and Shawnee Indians their proportion of the amount appropriated by the Act of March 3, 1883, before mentioned.

The agreement of December 19, 1891, does not contemplate an examination of any indebtedness or accounts arising under any treaty or agreement subsequent to 1868, and it is sufficient to state that these several sums were advanced to the Cherokee Nation and charged against the proceeds of the sale of the Cherokee Outlet, which is shown upon the accompanying map and described as "Cherokee Outlet" and were accounted for in the transaction concluded by the purchase of the Outlet under the provisions of the act of March 3, 1893.

The territory known as the "neutral lands" was surveyed and sold according to the treaty provisions, and the receipts and disposition of the net proceeds are shown by the following statement:

Sale of Neutral Lands—Treaty of July 19, 1866:		
Gross proceeds, including interest on deferred payments, and premium on sale of coin	$985,296.96	
Expenses of negotiating treaty of 1866, of survey and sale, and of Cherokee delegation	85,461.78	
Net proceeds		899,835.18
Disposition of net proceeds:		
Amount used in payment of national warrants	33,860.12	
Interest carried to the credit of the interest accounts of the National School and Orphan funds	47,627.27	
Amount invested in $740,941.77 United States stocks	818,347.79	
Total		899,835.18

A printed statement showing in detail the receipts and disbursements on account of the sale of these lands, was furnished Mr. D. W. Bushyhead, Treasurer of the Cherokee Nation, by the Commissioner of Indian Affairs, at the request of Mr. Bushyhead, of date May 15, 1874.

The receipts and disbursements of the net proceeds of the sales of the Cherokee Strip are shown in the following statement:

Sale of Cherokee Strip—Treaty of July 19, 1866, and act of Congress of May 11, 1872:		
Gross proceeds, including interest on deferred payments	$560,361.94	
Expenses of survey and sale	22,479.71	
Net proceeds		537,882.23
Disposition of net proceeds:		
Amount invested in $67,675.27 United States stocks, for the benefit of the Cherokee Asylum, Act of Feby. 14, 1873, (17 Stats. p. 462)	75,000.00	
Amount used for the establishment of an Asylum, Act of Feby. 14, 1873	25,000.00	
Amount invested in $30,920.49 for the National, School and Orphan funds	35,890.25	
Amount used in the payments of National warrants	8,275.11	
Amount paid W. A. Phillips, Attorney	6,984.38	
Amount remitted to the Nation, through the U. S. Indian Agent and its National Treasurer	386,300.21	
Balance due the Nation	432.28	
Total		537,882.23

The last item of this statement, "balance due the nation, $132.28," was the balance of the amount received by the Receiver of Public Moneys at Independence, Kansas, in the 4th quarter of 1873, and has never been accounted for by him, and is due the Cherokee Nation, with interest from January 1, 1874, at the rate of 5% per annum.

These several sums comprise all the moneys accruing to the Cherokee Nation under the treaties of 1866 and 1868, and have been properly paid, except as above noted.

Under the treaty of 1835, and the supplement of 1836, it was provided that $300,000 should be set apart as a permanent national fund, $150,000 as a school fund (to which was to be added the amounts received from the sale of the Alabama and Tennessee school lands), and $50,000 as an Orphan fund, and that the annuity of $10,000 should be commuted for the sum of $214,000. These sums amounted to $714,000, and were invested in bonds aggregating $708,761.39. The $52,490, arising from the sale of the Alabama school lands, was likewise invested, the bonds purchased aggregating $51,138, making a total invested fund of $759,899.39.

The additions and deductions to the several funds into which this total amount was divided, together with the receipts and disbursements of interest thereon, are shown with great fidelity of detail in the Indian Office Trust Fund Ledgers, Nos. 1, 2, & 3. As a part of this examination, these accounts have been carefully and exhaustively compared and balanced, and it has been found, both with respect to principal and interest, that the funds have been faithfully administered and that no improper charges have been made against them.

In 1874, at the request of Mr. Bushyhead, the then Treasurer of the Cherokee Nation, a detailed statement of the trust fund account down to May of that year, was rendered to him to enable him to open a proper set of accounts with the United States. The several bond transactions since that time have been printed in detail in the annual reports of the Commissioner of Indian Affairs, which comprise statements of the changes made in the securities, the profit or loss involved in the change, the sources from which the additions to the funds were derived, and the interest due thereupon. Inasmuch as these statements are in print and accessible, it has not been considered desirable to extend them in this report, as it would be mere repetition of transactions of which the Cherokee Nation has full knowledge.

No deduction has been made from the capital of the nation or from the invested fund of the nation with the exception of the years 1867, 1869, 1871 and 1873, when, in accordance with the 23d article of the treaty of 1866, authorizing the Secretary of the Interior to dispose of securities sufficient to realize an amount not exceeding $150,000 for the payment of the debts of the Cherokee Nation, there was sold in 1867, $89,700 of bonds, realizing $90,914.02 and in 1869, $15,000, realizing $16,581.25; in 1871, $3,200, realizing $3,552, and in 1873, $600, realizing $664.50.

The difference between these amounts and the $150,000 amounting to $38,288.23, was derived from the scale of the neutral and strip lands. The only other deduction from the fund, consisting of an interest item on $15,000 taken from the Choctaw fund and expended for the Cherokees, will be further alluded to hereafter.

The following statement shows the several funds of the Cherokee Nation, and the annual interest thereupon, at the date of this report:

*Statement of Stocks and Funds Held in Trust by the United States for the Cherokee Nation.**

Funds.	Treaty or act.	Stocks.	Funds in lieu of investment.	Total.	Annual interest.
National	Dec. 29/35 Ap'l 1/80	†$602,638.56	$775,904.65	$1,378,543.21	$73,833.55
School	Feb. 27/19 Dec. 29/35 Ap'l 1/80	†77,854.28	736,705.98	814,560.26	41,576.55
Orphan	Dec. 29/35 Feb. 14/73 Ap'l 1/80	22,223.26	337,456.05	359,679.31	18,206.20
Asylum	Feb. 14/73 Ap'l 1/80	....	64,147.17	64,147.17	3,207.37
Tota'ls	.....	$702,716.10	$1,914,213.85	$2,616,929.95	$136,823.67

*For details, subject to changes noted above, see Annual Report of the Commissioner of Indian Affairs for 1893, pages 531, 532, and 533.

†Including $68,000 and $15,000 bonds, belonging to the National and school funds, respectively, abstracted prior to 1861.

Changes since November 1, 1893: National Fund:—$20,406.25, out of funds held in lieu of investment, paid to Choctaws, per act of March 3, 1893 (Stats. 27, p. 638). School Fund: $351.20 added to funds held in lieu of investment, from sales of school lands in Alabama.

The interest due the Cherokee Nation upon its funds has been fully, though not regularly, paid. Owing to the fact that some of the investments were in nonpaying State stocks, and that certain of the bonds had been abstracted, the interest was not regularly received by the United States government, and was not, in every instance, remitted at the precise time due, but taking the transaction as a whole, the interest upon both the nonpaying and the abstracted bonds has been paid in full, so that no foundation for a claim on account of interest now exists. During the war period the interest upon these funds instead of being devoted to the specific purposes contemplated by the division of the maximum fund into national, school and orphan funds, was expended for the support of loyal Cherokees who had been dispossessed of their homes and property by reason of the war. Under the circumstances of the Cherokee Nation, it would have been impossible to apply the several items of interest properly belonging to the school and orphan funds to those purposes, as the schools had ceased to exist. In view of the fact that the interest on these funds was expended for the benefit of the

Cherokees for rations, seeds, agricultural implements, clothing and other necessaries of life, no objection can properly be made to this application of this interest. It is understood that the Cherokee Nation makes no objection and raises no question as to the propriety of the interest disbursements during this exceptional period.

On the 4th of June, 1863, $15,000 belonging to the Choctaw orphan reservation fund was remitted to Wm. G. Coffin, Superintendent of Indian Affairs, at Leavenworth, Kansas, and was expended for the relief of persons belonging to the Cherokee Nation. Why the Choctaw funds instead of the Cherokee funds were called upon for this purpose does not clearly appear, but it is evident that there was no warrant for such a diversion: first, by reason of the fact that the Cherokee invested fund at that date amounted to over $800,000; and, secondly, that while it appears from the trust fund ledgers that the interest due the Cherokee Nation had been paid to its treasurer and to Indian Agents on its account to the point of absolute exhaustion, there had accrued and was due to the Cherokee Nation, although not then carried to their credit upon the books, an amount of interest upon the entire fund of the Nation exceeding $100,000, and upon the actual receipts of the sale of the Alabama school land, to an amount exceeding $15,000. By reference to the appropriations of March 1, 1864, and March 3, 1865, it will be seen that at the time of this transaction there was to the credit of the Cherokees a sum many times larger than the amount which was improperly loaned them from the Choctaw funds.

This transaction disappeared from sight and was not brought to light until 1890, when attention was called to it through an examination of the Choctaw accounts made for the use of the Court of Claims in 1889. The Cherokee Nation, therefore, for nearly 30 years, although in possession of ample funds, were unconscious and involuntary borrowers of this sum from the Choctaws. It seems beyond controversy that if the necessities of the Cherokee Nation required the expenditure of $15,000, the amount should have been taken from the interest accrued to their credit, or at any rate from their own fund. The $15,000 was restored to the Choctaw Nation, from interest due upon the Cherokee national funds, by the act of August 19, 1890.* By the act of March 3, 1893,† the interest on this fund from June 4, 1863, to August 18, 1890, amounting to $20,406.25, was paid to the Choctaws and charged to the Cherokee invested fund. While it is true that the Choctaw fund was subjected to this loss of interest, it is equally true that the Cherokee fund never derived any interest benefit from the expenditure of the $15,000, as it was applied to the relief of individual Cherokees. The consequence of this transaction is that the Cherokee fund has been depleted by this amount of over $20,000, by virtue of a loan which it did not request, and of which it had no knowledge, and which it was

*U. S. Statutes at Large, Vol. 26, page 340.
†U. S. Statutes at Large, Vol. 27, page 638.

in a condition to pay at any moment after the loan was made. Under these circumstances, it seems clear that the Cherokee Nation is entitled to a re-imbursement of this amount, the same to be restored to the principal of their national fund, with interest at the rate of five per centum per annum from the date of the payment to the Choctaws.

On the 29th of November, 1851, the Cherokee National Council, by its proper officers, made a formal statement of the national claims arising under the treaties of December, 1835, and August, 1846, stating the several claims as shown in the following numbered paragraphs:

> 1st. Because no allowance is made for the sums taken from the Treaty fund for removal to the West, although that charge depended on precisely the same words in the treaty of 1835 as did the one year's subsistence, and the Senate unanimously decided on the question, submitted to them as arbitrators, that the item of subsistence was not a proper charge on the Cherokee fund. That had been the decision of the Senate about the date of the treaty when that question was specially presented. It was again so considered by Mr. Poinsett, Secretary of War, in 1838, and his decision was sanctioned by the action of Congress, and an appropriation was made for that purpose; but the estimates being too small by half the Indian fund was then for the first time seized upon.

This claim is finally disposed of by the finding respecting the amount due for removal under treaty of 1835.

> 2nd. If it be conceded that the Cherokee fund was liable for these charges their amount was limited by the 8th article of the treaty to a certain specified amount and the government had no right to exceed that amount and charge it to the Indian fund.

This also is disposed of by the finding before alluded to.

> 3rd. We complain that the alternative of receiving for subsistence, $33.33, as provided for in the treaty, was refused to be complied with and the people forced to receive rations in kind at double the cost.

There is no evidence within reach to show whether this complaint is founded upon fact. No specific statement of such claims has ever been presented; but, in any event, that would constitute individual claims and not national claims in the sense in which the term is used under the articles of agreement by authority of which this investigation has been made.

> 4th. We complain that the rations issued by the Military Commandant at Fort Gibson to "indigent Cherokees" was improperly charged to treaty fund, without any legal authority.

This is also covered by the finding under the treaty of 1835. There seems to be no obligation upon the part of the United States, under any of the treaties, to furnish subsistence to emigrants after one year from the date of their arrival in the western country. The amount referred to, $172,316.47, was expended for subsistence after the expiration of one year, and was a necessary expenditure to save a large proportion of the Western Cherokees from great suffering. Unless the amount is to be re-imbursed as a simple act of charity there is no reason for its restoration, and the finding in this respect is that the charge was a proper and legitimate one against the treaty fund.

> 5th. We claim that the United States is bound to re-imburse the amount paid to more than 200 or 300 Cherokees who had emigrated to the west prior to 1835. But who were refused a participation in the "Old Settler" fund and thrown on the emigrant party who removed after that date.

This claim seems to be made without foundation since emigrants who removed west subsequent to June 1833 and before the treaty of 1835 were by article 15 of the treaty, as well as by virtue of the terms of the enrollment, entitled to participate in all benefits arising under the treaty of 1835 as Eastern Cherokees, and were not, by reason of their removal, incorporated with the Old Settlers or Western Cherokees.

> 6th. We claim that the Cherokees who remained in the States of Georgia, North Carolina and Tennessee were not entitled to any share in the per capita fund as they complied with neither of two conditions of their remaining east, both of which were indispensable, and, also, because the census of those Cherokees is, as we believe, enormously exaggerated.

The per capita distribution was made under article 15 of the treaty of 1835, which provides that after deducting from the treaty fund the proper expenses and the amounts set apart for general funds, "the balance whatever the sum may be shall be equally divided between all of the people belonging to the Cherokee Nation east according to the census just completed." The census referred to was taken in 1835 by several agents of the United States Government, and the original is now on file in the Indian Office. This census included the Cherokees residing in the states mentioned in the above claim.

The payments made to the Cherokees in the Indian Territory were based upon a roll made by George Butler in 1851, which was corrected by comparison with the original roll. The census made in North Carolina was based upon a roll made by D. W. Siler in 1851, which roll was also based upon the original. There was not only no exception made to the treaty in this respect to those Cherokees who remained in the east, but it was the understanding at the time the treaty was made that the entire tribe was to participate in the per

capita distribution. There is, therefore, no foundation for the above claim.

7th. We complain that the sum of $103,000 has been charged upon the treaty fund for expenses of Cherokees in Georgia three months after they were all assembled and had reported themselves to Gen'l Scott as ready to commence the march.

This is disposed of by the finding under the treaty of 1835, and the appropriation by Congress of the entire sum expended for subsistence, which wholly relieves the treaty fund from all charges for both removal and subsistence.

8th. We claim interest on the balance found due us from the 15th of April, 1851, till paid, Congress having no power to abrogate the stipulations of a treaty.

This claim is also disposed of in the general finding under the treaty of 1835.

9th. We also complain that $20,000 of the fund of the Emigrant Cherokees were taken to pay the counsel and agents of the "Old Settlers" without any authority.

It does not appear that the United States was in any way a party to this transaction, or is either directly or indirectly responsible for it. It appears, from page 139, trust fund ledger No. 1, Indian Office records, that on the 9th day of August, 1846, there was paid to David Vann, Treasurer of the Cherokee Nation, then in Washington, the sum of $51,131.83, which exhausted the accrued interest to the credit of the Cherokee national fund. While it is unquestionably true that $20,000 of this money was loaned to the representatives of the Old Settler party, it was the action of the Treasurer of the Nation, on his own responsibility, and was wholly a transaction between the Cherokee government party and the Old Settler party. There is, therefore, no claim against the United States on account of this advance or loan.

The foregoing statement covers, it is believed, every point of issue which can be raised under the treaties described in the articles of agreement, and the result of the finding is submitted in the following schedule:

Under the treaty of 1819;
Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the "School" Fund..... $2,125.00
With interest from Feby. 27, 1819, to date of payment.
Under the treaty of 1835;
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to Treaty Fund..... 1,111,284.70
With interest from June 12, 1838, to date of payment.
Under treaty of 1866;
Amount received by Receiver of Public Moneys at Independence, Kansas, never credited to the Cherokee Nation..... 432.28
With interest from January 1, 1874, to date of payment.
Under act of Congress March 3, 1893;
Interest on $15,000 of Choctaw Funds, applied in 1863, to relief of indigent Cherokees, said interest being improperly charged to Cherokee National Fund..... 20,406.25
With interest from July 1, 1893, to date of restoration of the principal of the Cherokee Funds held in trust in lieu of investments.

JAS. A. SLADE.
JOS. T. BENDER.

V. S. HILLIS, *Stenographer.*

WASHINGTON, D. C., *April 28th*, 1894.

Be it enacted by the National Council: That the report of the accounting agents appointed under an agreement between the United States, and the Cherokee Nation, dated the 19th day of December 1891, to "render to the Cherokee Nation through any agent appointed by authority of the National Council, a complete account of moneys due the Cherokee Nation, under any of the treaties ratified in the years of 1817, 1819, 1825, 1828, 1833, 1835–6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States, for the purpose of carrying said treaties or any of them into effect," that said report signed by James H. Slade and Joseph T. Bender, accounting agents on the part of the United States, and dated April 28, 1894, together with the report of R. F. Wyly, agent of the Cherokee Nation, submitted by him to the National Council, and the same is hereby accepted—the total findings of said accounting agents being $1,133,841.98,(one million, one hundred and thirty-three thousand, eight hundred and forty-one dollars and ninety-eight cents,) with interest at the rate of five per cent. per annum, from the various dates

of items composing this amount of claim. (See report of accounting agents for dates of items composing this claim.)

Be it further enacted, That the Principal Chief of the Cherokee Nation, at once notify the Secretary of the Interior, and the Commissioner of Indian Affairs of the acceptance by the National Council of the Cherokee Nation, of said report of accounting agents, and request the Secretary of the Interior, to so notify the Congress of the United States, and ask for an immediate appropriation in accordance with the act of March 3d, 1893, for the ratification of the sale of the Cherokee lands west of the Arkansas River, known as the Cherokee "outlet."

Approved Dec. 1st, 1894.

C. J. HARRIS,
Principal Chief Cher. Nat.

EXECUTIVE DEPARTMENT C. N., *Dec. 15th*, 1894.

I, W. H. Mayes, Asst. Executive Secretary do hereby certify that the above is a true and correct copy of the original, now on file in this office.

W. H. MAYES,
Asst. Executive Secretary.

[SEAL.]



FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 346.

THE UNITED STATES, APPELLANT,

vs.

THE CHEROKEE NATION.

Office Supreme Court U. S.
FILED
JAN 13 1906
JAMES H. McKENNEY,
Clerk

No. 347.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE CHEROKEE NATION.

No. 348.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

EDGAR SMITH,
CHARLES NAGEL,
FREDERIC D. McKENNEY,
Attorneys for the Cherokee Nation.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 1909

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PRELIMINARY STATEMENT.

By section 68 of the Act of Congress of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein,

and for other purposes" (32 Stats., 716, 726), jurisdiction was conferred "upon the Court of Claims to examine, consider and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," and full power was also conferred upon the Court of Claims "by proper orders and process to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy."

Under the authority of this act the Cherokee Nation on February 20, 1903, filed its petition (No. 23,199) in the Court of Claims, asserting that it is and since the act of union of July 12, 1839, between the Eastern and Western Cherokees "has been a body politic, recognized and dealt with as such by the United States in all matters affecting the rights, interests, and property of the Cherokee Nation, or tribe, or the members thereof" (R., 2); that at the time of the making of the treaty (of December 19, 1891, ratified by act of Congress of March 3, 1893, 27 Stats., 640), for the purchase by the United States from the Cherokee Nation of the lands known as the "Cherokee Outlet," and for many years prior thereto the Cherokee Nation insisted that there was due to it from the United States under stipulations of certain treaties entered into with the latter various sums of money, as to which it, the nation, had long been petitioning the Congress for a true and just accounting and payment, and such an accounting and an agreement to pay all moneys found to be due thereunder was then demanded by said Cherokee Nation as a condition precedent to and as part consideration for the sale by said nation to the United States of said lands; that it was accordingly provided by the fourth subdivision of article 2 of said treaty that—

"The United States shall, without delay, render to the

Cherokee Nation, through any agent appointed by authority of the National Council, a complete account of monies due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835–6, 1846, 1866, and 1868 and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation, by its National Council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States, by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress, according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its National Council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting;"

That in addition to ratifying the terms of said treaty of December 19, 1891, with some amendments not important here, it was further provided by said act of March 3, 1893, that the Secretary of the Interior, in addition to the sum of $295,736, immediately available, was authorized and directed to pay eight million three hundred thousand dollars, or so much thereof as may be necessary, to the Cherokee Nation for all the right, title, interest, and claims which said nation of Indians may have in and to the lands described in said treaty, and commonly known and called the "Cherokee Outlet," said sum to be payable in five equal annual installments, commencing March 4, 1895, and ending March 4,

1899; the acceptance by the Cherokee Nation of Indians of any of the money so appropriated to "be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement" as amended, "and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands;" and it was also provided by said act that—

"The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated out of any money in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said Nation, as required in the fourth subdivision of article two of said agreement;"

that under the last-mentioned provision of said act Messrs. James A. Slade and Joseph T. Bender were employed by the United States Government to render the account required by said fourth subdivision of article 2 of said treaty, and thereafter under date of April 28, 1894, said Slade and Bender rendered such an account whereby it appeared that there was due from the United States to the Cherokee Nation certain moneys as follows:

"Under the treaty of 1819:	
"Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'School' fund.....	$2,125.00
"With interest from February 27, 1819, to date of payment.	
"Under treaty of 1835:	
"Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund.....	1,111,284.70
"With interest from June 12, 1838, to date of payment.	

"Under treaty of 1866:

"Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation.....	432 28
"With interest from January 1, 1874, to date of payment.	
"Under act of Congress, March 3, 1893:	
"Interest on $15,000 of Choctaw funds, applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund.....	20,406.25
"With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments;"	

that the account so stated, showing said balances due to the Cherokee Nation as aforesaid, was duly rendered to said Cherokee Nation by the Secretary of the Interior (R., 3) and was duly accepted by said nation by an act of its national council in the manner and form required by said treaty, and no suit was brought against the United States charging that said account was incorrect or unjust; but, on the contrary, the principal chief of the Cherokee Nation, by the direction of the national council, notified the Secretary of the Interior and the Commissioner of Indian Affairs of the acceptance by said nation of said accounting and requested the Secretary of the Interior to so notify the Congress of the United States and to ask for an immediate appropriation to pay the amount so stated to be due, as provided in said treaty, which request was complied with by said Secretary of the Interior; but the Congress failed to appropriate the moneys necessary to satisfy the amounts stated in said accounting to be due to said Cherokee Nation, and no part of the same has ever been paid.

So much of the act of July 1, 1902 (32 Stats., 716), under

which this petition was filed, as is supposed to have any bearing upon any of the matters in controversy in these consolidated causes is, *in extenso*, as follows:

SECTION 1. The words "nation" and "tribe" shall each be held to refer to the Cherokee Nation or tribe of Indians in Indian Territory.

SEC. 2. The words "principal chief" or "chief executive" shall be held to mean the principal chief of said tribe.

SEC. 7. The words "member" or "members" and "citizen" or "citizens" shall be held to mean members or citizens of the Cherokee Nation, in the Indian Territory.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enroll-

ment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided*, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

SEC. 64. The collection of all revenue of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under

rules and regulations to be prescribed by the said Secretary.

SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

SEC. 66. All funds of the tribe, and all monies accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this Act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall make all needed rules and regulations to carry this provision into effect.

SEC. 68. Jurisdiction is hereby conferred upon the Court of Claims to examine, consider and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this Act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment

of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time.

SEC. 74. This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

SEC. 75. The principal chief shall, within ten days after the passage of this Act of Congress, make public proclamation that the same shall be voted upon at a special election to be held for that purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by Cherokee law, and the votes shall be counted by the Cherokee national council, if then in session, and if not in session the principal chief shall convene an extraordinary session for the purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and proclamation of the result, and transmit the same to the President of the United States.

Said act of July 1, 1902, as required by sections 74 and 75 thereof was duly ratified by the Cherokee Nation at a special election held for that purpose on August 7, 1902, and such result was duly certified to the President of the United States.

The act of March 3, 1903, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June

thirtieth, nineteen hundred and four, and for other purposes" (32 Stats., 998), contains the following provisions:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi river, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: *Provided*, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive Document Numbered Three Hundred and Nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi river constitute a part of the Cherokee Nation or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in said H. R. Ex. Doc. No. 309, 57th Cong., 2d sess., is therein referred to and described as follows:

"*Resolved*, That the Attorney General of the United States is hereby requested to advise the House of Representatives, with all convenient speed, in the case of the Eastern Cherokees against the United States, whether or not the award

rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893, as set forth in H. R. Ex. Doc. No. 181, 53d Cong., 3d sess., and the findings of fact of the Court of Claims of April 28, 1902, is *res adjudicata;* to review the opinion of the Department of Justice of December 2, 1895, and advise the House of Representatives whether the reasons set forth in that opinion now constitute a valid defense for the payment of said award."

On March 10, 1903, a petition (No. 23212), entitled "The Eastern Cherokees vs. The United States," was filed on behalf of—

"about 3000 persons, more or less, all Eastern Cherokees residing for the most part in Cherokee, Graham, Swain, and Macon counties, North Carolina, some in North Georgia and eastern Tennessee, together with about 800 persons, portions of their various families, gone West, nearly all of whom have been recognized as citizens and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina" (R., 5).

The object of said petition was therein stated to be the recovery by the claimants specified from the United States of "their pro rata share" of the item of $1,111,284.70, with interest thereon, appearing in the accounting of Slade and Bender.

This petition is subscribed by Belva A. Lockwood, counselor for petitioners. An amended petition, entitled "The Eastern and Emigrant Cherokees vs. The United States," was filed by the same counselor, September 3, 1903, on behalf of "about 4500 persons, more or less, all Eastern or Emigrant Cherokees residing &c. &c. * * * and others of the same class, whose names or those of whose ancestors may be found on the rolls of 1835 and 1838" (R., 8).

In this amended petition, as in the original petition, the right of recovery in favor of the claimants therein described is limited to their pro rata share of the single item of $1,111,284.70 and interest thereon "as found by the expert

accountants, Messrs. Slade and Beuler, April 28, 1894" (R., 9).

On March 14, 1903, a further petition (No. 23214), entitled "The Eastern Cherokees *vs.* The United States and the Cherokee Nation," was filed on behalf of "those persons who were parties to the treaty of 1835–'36 (7 Stats. L., p. 479), being also those persons described in article 9 of the treaty of 1846 (9 Stats. L., p. 871) as 'those individuals, heads of families, or their legal representatives, entitled to receive' their per capita pledged by 'the treaty of 1835 and the supplement of 1836,' being all those Cherokees residing east at the date of said treaty and the supplement thereto." This petition was subscribed "Eastern Cherokees by Rob't L. Owen, attorney," and asserted the right on behalf of petitioners to recover "from the United States the sum of one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70) or the sum of one million seven hundred and sixty-one thousand four hundred and fifty-seven dollars and twenty-seven cents ($1,761,457.27) accordingly as the court may or may not sustain the award (of Slade and Beuler) * * * with interest thereon, at the rate of five per cent. per annum, from June 12, 1838, until paid, together with interest on the income annually accruing, at the rate of five per centum per annum until paid" (R., 11–12).

As directed by the Court of Claims (R., 39), each party claimant has in some appropriate manner become impleaded with the claimants in each of the other two cases, and before the hearing below the three cases were "consolidated and brought to trial as one case without prejudice to the several rights of the parties claimant."

A general traverse on behalf the United States was filed in the consolidated causes (R., 43).

Upon the hearing in the Court of Claims the three items above described as follows:

"Under treaty of 1819:
"Value of three tracts of land, containing 1,700 acres at $1.25 per acre, to be added to the principal of the school fund..... $2,125.00
"With interest from February 27, 1819, to date of payment.

"Under treaty of 1866:
"Amount received by receiver of public moneys at Independence, Kansas, never credited to Cherokee Nation..... 432 28
"With interest from January 1st, 1874, to date of payment.

"Under act of Congress, March 3d, 1893:
"Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund..... 20,406.25
"With interest from July 1st, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments."

were conceded by the Assistant Attorney General in favor of the Cherokee Nation (R., 47), and the judgment of that court in favor of said nation, in so far as those three items are concerned, would seem to be indisputable.

The real controversy presented by this record revolves around the second item described in the report of Messrs. Slade and Bender as follows:

"Under treaty of 1835:
"Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund... .... $1,111,284.70
"With interest from June 12th, 1838, to date of payment."

which item was also adjudged in favor of the Cherokee Nation by the court below.

As to this item, the parties claimant, united in their contention that the United States is liable to pay some one or other of them. The United States denied that it was liable to pay any of them. The Cherokee Nation on its part contended in the court below that as the treaty of December 19, 1891, ratified by the act of March 3, 1893, under the fourth section of article II of which the Slade-Bender accounting was had, provided that the United States, in consideration of the cession by the nation of the "Outlet," should render to the nation "a complete account of moneys due the Cherokee Nation," and as the item of $1,111,284.70 and interest thereon, which was the basis of all the several claims of right to recover as against the United States, appeared by said accounting to be due to the Cherokee Nation, the judgment upon this and other grounds which are hereinafter set forth at length should necessarily be in its favor for the benefit of all members of the Cherokee Nation, irrespective of ancient distinctions or nomenclature. Counsel for the Eastern Cherokees, on the other hand, contended that, as the Slade-Bender accounting, in so far as this item is concerned, rested upon the treaty of 1835–36, the provisions of said treaty, taken in connection with or as explained by the terms of the treaty of 1846, should control the action of the court, and the judgment should be in favor of the so-called Eastern Cherokees for per capita distribution among themselves, to the exclusion of those members of the nation commonly known as Western Cherokees or "Old Settlers" and others.

The judgment of the Court of Claims is in favor of the nation by name upon all four items claimed.

With respect to items 1, 3, and 4 and the disposition directed by that judgment to be made of the proceeds thereof, there is no dispute at the instance of any party to this record.

Assignment of Error by the Cnerokee Nation, Appellant.

With respect to item 2, for $1,111,280.70 and interest, the Cherokee Nation contends that, the Court of Claims having found that amount to be due to the nation as such, said court was without legal power to direct the distribution thereof by the Secretary of the Interior in the manner specified in its said judgment, for the reason that such judgment in such respect was in conflict with the terms of the act of July 1, 1902, *supra*, conferring jurisdiction upon that court in the premises.

Statement of Facts and Extracts from Treaties and Legislative Enactments Bearing Thereon.

Prior to the year A. D. 1808, the Cherokee Nation of Indians was domiciled in Georgia, Alabama, Tennessee, North Carolina, and South Carolin , where they owned and possessed about 14,000,000 of acres of land. In that year deputations from the upper and lower Cherokee towns, duly authorized by their nation, went to the city of Washington, the deputies of the former to make known to the President of the United States the anxious desire of those whom they represented to engage in the pursuits of agriculture and civilized life in the country which they then occupied, and to request the establishment of a division line between the upper and lower towns, so that they might the more readily begin the establishment of fixed laws and a regular government; the deputies of the latter to make known to the President their desire to continue the hunter life, and owing to the scarcity of game where they then lived, their wish to remove across the Mississippi river on some vacant lands of the United States.

After maturely considering the petitions of both parties,

on January 9, 1809, the President answered the same, saying that—

"The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who wish to remove are permitted to send an exploring party to reconnoiter the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements which will begin at the mouths of those rivers. * * *

"When this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right."

Relying on the promises of the President of the United States, as above recited, the Cherokees who wished to remove explored the country on the west side of the Mississippi and made choice of and settled themselves down upon lands of the United States on the Arkansas and White rivers, to which no other tribe of Indians had any just claim, and subsequently sent their agents, duly empowered to execute a treaty relinquishing to the United States all their right, title, and interest to all lands which they had left, or which they were about to leave, and belonging to them as a part of the Cherokee Nation, in all of which lands, proportioned to their numbers, they had an equal right.

To the treaty of cession, which was subsequently entered into on the 8th day of July, 1817, the chiefs, headmen, and warriors of the Cherokee Nation east of the Mississippi, as well as the chiefs, headmen, warriors, and deputies of the Cherokees on the Arkansas river were parties.

By article 1 of said treaty "the chiefs, headmen, and warriors of the whole Cherokee Nation" ceded to the United States certain lands described therein, "in part of the proportion of land in the Cherokee Nation east of the Missis-

sippi river, to which those now on the Arkansas and those about to remove there are justly entitled."

By article 2 said chiefs, headmen, and warriors also ceded to the United States other lands therein described.

"By art. 4 the contracting parties do also stipulate that the annuity due from the United States to the whole Cherokee Nation for the year one thousand eight hundred and eighteen is to be divided between the two parts of the nation in proportion to their numbers, agreeably to the stipulations contained in the third article of this treaty; and to be continued to be divided thereafter in proportion to their numbers; and the lands to be apportioned and surrendered to the United States agreeably to the aforesaid enumeration, as the proportionate part, agreeably to their numbers, to which those who have removed, and who declare their intention to remove, have a just right, including these with the lands ceded in the first and second articles of this treaty.

"By art. 5 the United States bind themselves, in exchange for the lands ceded in the first and second articles hereof, to give to that part of the Cherokee Nation on the Arkansas as much land on said river and White river as they have, or may hereafter receive from the Cherokee Nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas, agreeably to their numbers. * * * And it is further stipulated that the treaties heretofore between the Cherokee Nation and the United States are to continue in full force with both parts of the nation, and both parts thereof (are) entitled to all the immunities and privilege which the old nation enjoyed under the aforesaid treaties, the United States reserving the right of establishing factories, a military post, and roads within the boundaries above defined.

"And by art. 6 the United States do also bind themselves to give to all the poor warriors who may remove to the western side of the Mississippi river one rifle gun and ammunition, one blanket, and one brass kettle; or, in lieu of the brass kettle, a beaver trap, which is to be considered as a full compensation for the improvements which they may leave, which articles are to be delivered at such points as the President of the United States may direct; and to aid in the removal of the emigrants, they further agree to furnish flat-

bottomed boats and provisions sufficient for that purpose; and to those emigrants whose improvements add real value to their lands, the United States agree to pay a full valuation for the same, which is to be ascertained by a commissioner appointed by the President of the United States for that purpose, and paid for as soon after the ratification of this treaty as practicable" (Finding of Fact No. II, R., 79–81).

February 27, 1819, a treaty was entered into between the United States and the "chiefs and headmen of the Cherokee Nation of Indians, duly authorized and empowered by said nation," the preamble of which is as follows:

"Whereas a greater part of the Cherokee Nation have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, signed the eighth of July, eighteen hundred and seventeen, might, without further delay, or the trouble or expense of taking the census, as stipulated in the said treaty, be finally adjusted, have offered to cede to the United States a tract of country at least as extensive as that which they probably are entitled to under its provisions, the contracting parties have agreed to and concluded the following articles:"

By article I the Cherokee Nation cedes to the United States the lands therein described, and the parties mutually declare "that the lands hereby ceded by the Cherokee Nation are in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their nation who have or may hereafter emigrate to the Arkansas; and this treaty is a final adjustment of that of the eighth of July, eighteen hundred and seventeen."

By article VI of said treaty it was estimated that the Cherokees who had emigrated and those who had enrolled for emigration together constituted one-third part in numbers of the whole nation (Finding of Fact No. III, R., 81).

On May 6, 1828, the United States entered into a treaty with the "Cherokee Nation of Indians west of the Mississippi," the preamble of which is as follows:

"Whereas it being the anxious desire of the Government of the United States to secure to the Cherokee Nation of Indians, as well those now living within the limits of the Territory of Arkansas as those of their friends and brothers who reside in States east of the Mississippi and who may wish to join their brothers of the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and

"Whereas it being important, not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either or both of those tribes, the parties hereto do hereby conclude the following articles, viz:"

Article 1 defines the western boundary line of Arkansas.

"ART. 2. The United States agree to possess the Cherokees and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land," all west of the western boundary of Arkansas and bounded as therein set forth, and "In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extend."

"ART. 3. The United States agree to have the lines of the above cession run without delay," and "to remove immedi-

ately after the running of the eastern line from the Arkansas river to the southwest corner of Missouri, all white persons from the west to the east of said line * * * and also to keep all such from the west of said line in future."

By article 5 it was agreed "that the United States, in consideration of the inconvenience and trouble attending the removal, and on account of the reduced value of a great portion of the land herein ceded to the Cherokees, as compared with that of those in Arkansas which were made theirs by the treaty of 1817 and the convention of 1819, will pay to the Cherokees, immediately after their removal, which shall be within fourteen months of the date of this agreement, the sum of fifty thousand dollars; also an annuity for three years of two thousand dollars, towards defraying the cost and trouble which may attend upon going after and recovering their stock, which may stray into the Territory in quest of the pastures from which they may be driven; also eight thousand seven hundred and sixty dollars for spoliations committed on them (the Cherokees), which sum will be in full of all demands of the kind up to this date," * * * and "to pay two thousand dollars annually to the Cherokees for ten years, to be expended under the direction of the President of the United States in the education of their children in their own country, * * * also one thousand towards the purchase of a printing press and type." * * *

"ART. 7. The chiefs and headmen of the Cherokee Nation aforesaid, for and in consideration of the foregoing stipulations and provisions, do hereby agree, in the name and behalf of their nation, to give up, and they do hereby surrender, to the United States, and agree to leave the same within fourteen months, as hereinbefore stipulated, all the lands to which they are entitled in Arkansas and which were secured to them by the treaty of 8th January (July), 1817, and the convention of the 27th February, 1819.

"ART. 8. The Cherokee Nation, west of the Mississippi, having by this agreement, freed themselves from the harass-

ing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and to their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States east of the Mississippi, who may desire to remove west, shall be given, on enrolling himself for emigration, a good rifle, a blanket and kettle, and five pounds of tobacco; (and to each member of his family one blanket), also a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation, and support by the way, and provisions for twelve months after their arrival at the agency; and to each person, or head of a family, if he take along with him four persons, shall be paid immediately on his arriving at the agency and reporting himself and his family, or followers, as emigrants, and permanent settlers, in addition to the above, *provided he and they shall have emigrated from within the chartered limits of the State of Georgia*, the sum of fifty dollars, and this sum in proportion to any greater or less number that may accompany him from within the aforesaid chartered limits of the State of Georgia."

Pursuant to the terms of this treaty, the Cherokee Nation, west of the Mississippi, peaceably removed from their lands on the Arkansas and White rivers, in the Territory of Arkansas, to the lands newly ceded to them in the Indian Territory. The moneys agreed to be paid to them under the fifth article have been fully paid and no claim is now made on such account (Finding of Facts No. IV, R., 81–83).

By treaty of February 14, 1833, between the United States and the "chiefs and headmen of the Cherokee Nation of Indians west of the Mississippi," a change in the boundary

lines of the lands ceded under the treaty of 1828 was agreed upon to adjust a conflict with the grant previously made to the Creek Indians, and by article 1 of said treaty of 1833 the United States, in addition to renewing its guarantee and pledge of 7,000,000 acres of land to the Cherokees, further agreed that—

"In addition to the seven million of acres of land thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend, * * * and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed."

By article 5 of said treaty it was provided that—

"These articles of agreement and convention are to be considered supplementary to the treaty before mentioned between the United States and the Cherokee Nation west of the Mississippi dated sixth of May, one thousand eight hundred and twenty-eight, and not to vary the rights of the parties to said treaty any further than said treaty is inconsistent with the provisions of this treaty now concluded, or these articles of convention or agreement."

Finding of Fact No. V, R., 83, 84.

On or about February 28, 1835, a delegation of the Cherokee Nation east of the Mississippi, having full power and authority to conclude a treaty with the United States, stipulated and agreed with the Government of the United States to submit to the Senate the matter of the amount which should be allowed to their nation for their claims and for a cession of their lands east of the Mississippi river, agreeing for themselves to abide by the award of the Senate of the United States and to recommend the same to their people for their final determination.

The Senate on March 6, 1835, by resolution, advised that "a sum not exceeding five millions of dollars be paid to the

Cherokee Indians for all their lands and possessions east of the Mississippi river."

The Cherokee delegation, after the award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty, but they declined to do so, insisting that the Senate had been misled to the injury of the Cherokees, and that the matter of said award "should be referred to their nation and there, in general council, to deliberate and determine on the subject in order to insure harmony and good feeling among themselves."

On or about March 14, 1835, a certain other delegation of Cherokees who represented that portion of the nation east, who were in favor of emigrating to the Cherokee country west of the Mississippi, but had no authority or power from the nation generally, entered into propositions for a treaty with John F. Schermerhorn, commissioner on the part of the United States, which they agreed to submit to the nation for final action and determination.

Among other things included in the draft of the proposed treaty, it was proposed that the sum of $5,000,000 should be paid to the members of the Cherokee Nation east for their lands and possessions in accordance with the above-quoted resolution or "award" of the Senate, but it was further proposed that there should be deducted from said five millions the sum of $255,000 to defray the expenses of removing the members of the nation to the west.

The proposed treaty was unanimously rejected by the Cherokee national council for the reason that the expense of removal was thereby proposed to be deducted from the fund of $5,000,000.

Finding of Fact No. VI, R., 84.

December 29, 1835, a treaty was drawn up between the United States and the "chiefs, headmen, and people of the

Cherokee tribe of Indians," which treaty is commonly called the "Treaty of New Echota."

Neither the "Western Cherokees" or "Old Settlers" nor the great body of the "Eastern Cherokees" were parties to this treaty and they at all times up to the making of the treaty of 1846 repudiated it on the ground that its execution had not been authorized by them or their representatives in council.

The small number of Cherokees east of the Mississippi who negotiated the treaty were called or styled the "Treaty Party."

It was provided, among other things, by this treaty as follows:

"ARTICLE 1. The Cherokee Nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles. But as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised 'that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river' have included and made any allowance or consideration for claims for spoliations, it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision, and if no allowance was made for spoliations, that then an additional sum of three hundred thousand dollars be allowed for the same.

"ART. 2. That as it was apprehended that the lands west of the Mississippi which the United States by treaty of May 6, 1828, and supplemental treaty of February 14, 1833, guaranteed and secured to be conveyed by patent "to the Cherokee Nation of Indians" did not contain a sufficient quantity of land for the accommodation of the whole nation on their removal west, the United States, in consideration of $500,000,

agreed to convey to said Indians by patent in fee simple a further tract of land estimated to contain 800,000 acres.

"ART. 3. The lands ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty should be included in one patent executed to the Cherokee Nation of Indians by the President of the United States.

"ART. 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as, in the opinion of the emigranting agent, are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family and, in lieu of their one year's rations, they shall be paid the sum of thirty-three dollars and thirty-three cents, if they prefer it.

"Such Cherokees also as reside at present out of the nation shall remove with them in two years west of the Mississippi and shall be entitled to an allowance for removal and subsistence as above provided.

"ART. 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, removal subsistence, and debts and claims upon the Cherokee Nation and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national fund provided for in the several articles of this treaty the balance whatever the same may be shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east, they shall also be paid for their improvements according to their approval value before their removal where fraud has not already been shewn in their valuation."

By article 16 it was stipulated that the Cherokees should remove to their new homes within two years from the ratification of this treaty.

The leaders of the treaty party who had signed the treaty of 1835 contended that the sum of $5,000,000 was not intended to include the amount which might be required to remove them.

On March 1, 1836, the President submitted to the Senate the following supplementary articles, which were adopted as part of the treaty:

"ARTICLE 1. It is therefore agreed that all the pre-emption rights and reservations provided for in articles 12 and 13 shall be and are hereby relinquished and declared void.

"ART. 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of — day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi river was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question, and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provision should be made therefor as might appear to the Senate to be just.

"ART. 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions, and of the sum of three hundred thousand dollars for spoliations described in the 1st article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed

agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims as ascertained shall be turned over and belong to the education fund.

"But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate, and if they shall approve the same then this supplement shall remain part of the treaty."

The treaty and the supplementary articles were ratified and adopted as one instrument and proclaimed May 23, 1836.

Finding of Fact No. VII, R., 86–88.

The Cherokee Indians who removed west of the Mississippi prior to May 23, 1836, were called "Western Cherokees." After the removal, under the treaty of 1835–36, of the Cherokees who had remained in the Cherokee country east of the Mississippi to the lands west of the Mississippi, the term "Western Cherokees" was no longer distinctive, and the Cherokees who had theretofore been known as such were thereafter popularly known as "Old Settlers."

The Cherokees who were domiciled east of the Mississippi river at the time of the making of the treaty of 1835–36, according to the census just then completed, were thereafter known as "Eastern Cherokees," the great body of whom subsequently, in 1838, moved to the lands west of the Mississip

Finding of Fact No. VIII, R., 88.

Subsequent to the treaty of 1828, and prior to the signing of the treaty of December 29, 1835, almost continuous efforts had been made to induce the Cherokee people east to remove to the Indian Territory, but without success. Under the provisions of said treaty of 1835 practically nothing was accomplished in such direction until the summer of 1838, when the Cherokee Nation east yielded to superior force, and, under the supervision and direction of their own leaders,

emigrated west of the Mississippi to the lands theretofore ceded to the Cherokee Nation west.

Finding of Fact No. IX, R., 88.

The sum of $600,000 provided for by the supplementary articles of the treaty of 1835–'36 was estimated to be more than sufficient to pay the cost of removal and all claims of every nature and description against the Government of the United States not otherwise provided for in said treaty, and it was therefore provided that whatever surplus might remain after removal and payment of claims should be turned over and belong to the education fund.

On July 2, 1836, Congress confirmed the action of the Senate, as evidenced by the supplementary articles of said treaty, and appropriated, according to the terms of the third supplementary article, heretofore quoted, $600,000 for the removal of the Cherokees and for spoliations.

This sum proved to be insufficient for the purposes for which it was appropriated.

The treaty of December 29, 1835, was refused recognition by the great body of the Cherokees. They protested against it through their constituted authorities on numerous occasions and refused to give it any recognition, declared it to be unauthorized by the Cherokee people and a fraud on the United States.

The (Eastern) Cherokees having made no preparations to remove, as required by the terms of the treaty of 1835, Gen. Winfield Scott, with an army of men in May, 1838, placed them in camps of concentration under military control, preparatory to their removal by force. Thereupon John Ross sought to make a treaty with the United States, but his overtures were rejected and the removal of the Cherokees by force was insisted upon by the United States, except in the alternative that the Indians would agree to remove themselves peaceably.

In the latter part of May, 1838, the President transmitted

to Congress a letter bearing date May 18, 1838, from the Secretary of War to John Ross, principal chief of the Cherokee Nation, wherein the following appears:

"If it be desired by the Cherokee Nation (East) that their own agent should have charge of their emigration, their wishes will be complied with and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect; with regard to the expense of this operation which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made of Congress."

This last communication was transmitted to Congress, and on May 23, 1838, the House of Representatives, by resolution, required a statement of the further amount necessary to pay for the removal and subsistence of the Cherokees (*ibid.*, 78). On May 25, 1838, the Secretary of War submitted an estimate to the Speaker of the House of Representatives "of the amount that would be required" to remove 15,840 Cherokees and to subsist 18,336 Cherokees, stating that the further sum necessary for this purpose was $1,047,067 (*ibid.*, 78), and on June 12, 1838, Congress appropriated this amount with the proviso that no part of it should be deducted from the $5,000,000 fund.

Finding of fact No. X, R., 88–89.

The cost of the removal of the Eastern Cherokees from Georgia to the Indian Territory, paid and expended by the United States, was $1,495,485.92, which amount was obtained as follows:

From the $600,000 appropriated July 2, 1836...	$335,105.91
From the $1,047,067 appropriated June 12, 1838.....	49,095.31
From the $5,000,000 appropriated July 2, 1836...	1,111,284.70
Total.....	$1,495,485.92

The amount of $1,111,284.70, charged against the $5,000,000 fund, as before set forth, still remains charged against that fund.

Finding of Fact No. XII, R., 90

After the removal of the Eastern Cherokees to the lands west of the Mississippi certain leaders of both the Western and Eastern Cherokees met at Illinois camp grounds, and there, on July 12, 1839, entered into an "Act of union between the Eastern and Western Cherokees," which is as follows:

"Whereas our fathers have existed as a separate and distinct nation in the possession and exercise of the essential and appropriate attributes of sovereignty from a period extending into antiquity, beyond the records and memory of man; and whereas these attributes, with the rights and franchises which they involve, remain in full force and virtue, as do also the national and social relation of the Cherokee people to each other and to the body politic, excepting in those particulars which have grown out of the provisions of the treaties of 1817 and 1819 between the United States and the Cherokee Nation, under which a portion of our people removed to this country and became a separate community (but the force of circumstances have recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured adapted to their present condition, and providing equally for the protection of each individual in the enjoyment of all his rights:

"Therefore we, the people composing the Eastern and Western Cherokee Nation, in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic under the style and title of the Cherokee Nation.

"In view of the union now formed, and for the purpose of making satisfactory adjustment of all unsettled business which may have arisen before the consummation of this union, we agree that such business shall be settled according to the provisions of the respective laws under which it

originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major-General Scott for their removal to this country shall continue in charge of that business, with their present powers, until it shall be finally closed; and, also, that all rights and titles to public Cherokee lands on the east or west of the River Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation as constituted by this union.

"Given under our hands at Illinois camp grounds this twelfth day of July, 1839.

"By order of the national convention:

"GEORGE LOWRY,

"*President of the Eastern Cherokees.*

his

"GEORGE X GUESS,

mark

"*President of the Western Cherokees.*"

On the 6th of September following, the Cherokees who had agreed upon the union adopted a constitution of government which, after reciting that the Eastern and Western Cherokees had become reunited in one body politic under the style and title of the Cherokee Nation, proceeds as follows:

"The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens, respectively, who made or may rightfully be in possession of them: *Provided*, That the citizens of the nation, possessing exclusive and indefeasible rights to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in any manner whatever to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as a citizen of this

nation shall cease: *Provided, nevertheless,* That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation, on memorializing the national council for such readmission."

At a meeting of the Cherokee people held at Tahlequah, in the Cherokee Nation, on January 16, 1840, the following declaration was made:

"Whereas a meeting of the Cherokee people was agreed on and requested by the United States agent and the assistant principal chief and others, on the 15th instant, at this place, and general notification given throughout the country to all parties whatever, requesting their prompt attendance for the purpose of ascertaining fairly and properly the sense and choice of a majority of the nation in relation to the subject of their future government; and whereas we, the people of the Cherokee Nation, having assembled under this call, and having heard, read and interpreted the act of union adopted by the Eastern and Western Cherokees, dated July, 1839, and the constitution framed by a convention composed of members from both parties in pursuance of the provisions of the aforesaid act, and being satisfied with the same, we do hereby approve, ratify, and confirm the said act of union and the constitution, and acknowledge and make known that the government based upon this act and this constitution is the legitimate government of the Cherokee Nation and of our choice, and that it has both our confidence and support.

"Done at Tahlequah, Cherokee Nation, the 16th day of January, 1840.

"J. VANN,
"*Assistant Principal Chief.*
"W. SHOREY COODEY,
"*President National Committee.*"

Notwithstanding said act of union and subsequent proceedings, there remained much bitter feeling between the Eastern Cherokees and the "Old Settlers," and violent measures were frequently resorted to on both sides to carry out their purposes. These circumstances, among others, led to

the making of the treaty of August 6, 1846 (9 Stats. L., 871), wherein it is recited that—

"Serious difficulties have for a considerable time past existed *between the different portions of the people constituting and recognized as the Cherokee Nation of Indians*, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people, against the United States;" therefore," with a view to the final and amicable settlement of the difficulties and claims before mentioned" and "to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be" (*Western Cherokees vs. United States*, 27 Ct. Cls., 36, par. 3), it is agreed, among other things, as follows:

"ARTICLE I. That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835 and in the third section of the act of Congress approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States, if the Indians become extinct or abandon the same.

"ART. III. Whereas certain claims have been allowed by the several boards of commissioners heretofore appointed under the treaty of 1835 for rents, under the name of improvements and spoliations, and for property of which the Indians were dispossessed, provided for under the 16th article of the treaty of 1835; and whereas the said claims

have been paid out of the $5,000,000 fund; and whereas said claims were not justly chargeable to that fund, but were to be paid by the United States, the said United States agree to reimburse the said fund the amount thus charged to said fund, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty; and whereas a further amount has been allowed for reservations under the provisions of the 13th article of the treaty of 1835 by said commissioners, and has been paid out of the said fund, and which said sums were properly chargeable to, and should have been paid by, the United States, the said United States further agree to reimburse the amounts thus paid for reservations to said fund; and whereas the expenses of making the treaty of New Echota were also paid out of said fund, when they should have been borne by the United States, the United States agree to reimburse the same and also to reimburse all other sums paid to any agent of the Government and improperly charged to said fund; and the same shall also form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty.

"ART. IV. And whereas it has been decided by the board of commissioners recently appointed by the President of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee Nation in particular, that that portion of the Cherokee people known as the 'Old Settlers,' or 'Western Cherokees' had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi; and whereas the said board of commissioners further decided that, inasmuch as the territory before mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi river, as well as in those occupied by themselves west of that river, which inter-

est should have been provided for in the treaty of 1835, but which was not, except in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be.

"Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, viz: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five millions six hundred thousand dollars (which investments and expenditures are particularly enumerated in the 15th article of the treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would, under such marshalling of accounts, be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one third part of said residuum, to be distributed per capita to each individual of said party of 'Old Settlers,' or 'Western Cherokees.' It is further agreed that, so far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five millions six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the 8th article of the treaty of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted. And, as it affects the settlement with the Western Cherokees, there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund; and it is hereby further understood and agreed that the principle above defined shall embrace all those Cherokees west of the Mississippi who emigrated prior to the treaty of 1835.

"In the consideration of the foregoing stipulation on the part of the United States, the 'Western Cherokees' or 'Old Settlers,' hereby release and quitclaim to the United States all right, title, or claim they may have to a common property in the Cherokee lands east of the Mississippi river, and to exclusive ownership to the lands ceded to them by the

treaty of 1833 west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included."

"ART. 9. The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835, the aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over per capita in equal amounts to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto.

"ART. 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi river had, or may have, under the treaty of 1835 and the supplement thereto.

"ART. 11. Whereas the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the West, of the Eastern Cherokees is not properly chargeable to the treaty fund, it is hereby agreed that that question shall be submitted to the Senate of the United States for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee funds, and if by the Cherokees, then to say whether the subsistence shall be charged at a greater rate than thirty-three 33/100 dollars per head; and also the question, whether the Cherokee Nation shall be allowed interest on

whatever sum may be found to be due the nation, and from what date and at what rate per annum."

Finding of Fact No. XIII, R., 90–96.

The Senate of the United States, acting as umpire under article II of the treaty of 1846, on September 5, 1850, passed the following resolution:

"*Resolved by the Senate of the United States*, That the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury.

"*Resolved*, That it is the sense of the Senate that interest at the rate of five per cent. per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid." (Sen. Journal, 31st Cong., 1st sess., p. 602.)

This amount was accordingly appropriated by Congress for that purpose by the act of September 30, 1850, with the proviso that interest be paid on the same at the rate of 5 per cent. per annum, according to a resolution of the Senate of the 5th of September, 1850. (9 Stat. L., p. 556.)

Finding of Fact No. XV, R., 96.

Under the fourth article of the treaty of 1846 the accounting officers of the United States made and prepared for settlement the account therein provided for, and the Congress on such account, by act of September 30, 1850 (9 Stats., 556), appropriated $532,782.18, which amount, with interest thereon at 5 per cent. from June 12, 1838, was thereupon paid and distributed to the Western Cherokees per capita.

Under the ninth article of the treaty of 1846 the accounting officers of the United States made and prepared for

settlement the account provided for by that article, whereby it appeared that there remained a balance due of $914,026.13, and the Congress accordingly, in addition to the amount of $180,422.76, which had been appropriated for by the act of September 30, 1850 (9 Stats., 556), pursuant to the resolution of the Senate, by the act of February 27, 1851, appropriated the further sum of $724,603.37, and said amounts were thereupon paid and distributed to the Eastern Cherokees per capita, with interest thereon at 5 per cent. from June 12, 1838.

On the 27th of November, 1851, before the payment of any money on account of either of the above-mentioned balances of $523,448.85 and $914,026.13 or the signing of any receipts by the Indians on account thereof, the Cherokee national council made a formal statement of the national claims arising, as was contended, under the treaties of December 29, 1835, and August 16, 1846, and protested against the above-mentioned settlement because of the failure of the accountants to credit therein the treaty fund with the expenses of removal.

On the 22d day of September, 1851, the western Cherokees also formulated a separate protest against the proposed settlement with them.

Both of the foregoing protests were transmitted to and received by the Commissioner of Indian Affairs during the month of April, 1852.

Finding of Fact No. XVI, R., 97–101.

By section 14 of the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1889, and for other purposes," approved March 2, 1889 (25 Stats. L., 1005), the President was authorized to appoint three commissioners to negotiate with the Indian tribes own-

ing or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and he did appoint David H. Jerome, Alfred M. Wilson, and Warren G. Sayre such commissioners.

By virtue of the authority contained in an act of the Cherokee national council, approved November 16, 1891, Elias C. Boudinot, Joseph A. Scales, Roach Young, William Triplett, Thomas Smith, Joseph Smallwood, and George Downing were duly appointed commissioners—

"To meet and enter into negotiations with the above-named commission, appointed by the President of the United States, for the cession of the lands of the Cherokee Nation west of the 96th degree of west longitude, and for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled."

By said act of Congress it was made the duty of said commissioners appointed by the President, to report all agreements resulting from such negotiations to the President, to be by him reported to the Congress at its next session, and by the act of the Cherokee council it was made the duty of the commissioners on the part of the Cherokee Nation to report all their proceedings in full to the national council for its approval and ratification.

At the outset of the negotiations between said commissioners for the purchase and sale of said lands, which were known as the "Cherokee Outlet," the commissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as "a condition precedent to any agreement for the sale of the

land" that some adjustment of such contentions should be made.

On the 19th of December, 1891, after prolonged negotiations, the commissioners above named entered into articles of agreement, by article 1 of which it was agreed that—

"The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth (100°) degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth (96°) degree west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by Executive order, dated August 10, 1860, the tract of land embraced within the above boundaries containing eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less."

By article 2 that—

"For and in consideration of the above cession and relinquishment the United States agrees:"

First. That it will remove from the limits of the Cherokee Nation as trespassers certain described persons.

Second. That a certain article of the antecedent treaty of July, 1866, should be abrogated and held for naught.

Third. That the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction in certain cases.

Fourth. That—

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–'36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of

them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting."

Fifth. That certain citizens of the Cherokee Nation should have the right to select lands as homesteads under certain conditions; and

Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States shall pay to the Cherokee Nation, at such times and in such manner as the Cherokee national council shall determine, the sum of $8,595,736.12 in excess of the sum of $728,389.46, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas river.

Said articles of agreement were accepted, ratified, and confirmed on the part of the Cherokee Nation by an act of the national council approved January 4, 1892, and were also accepted, ratified, and confirmed on the part of the United States by act of Congress of March 3, 1893 (27 Stat. L., 640).

Prior to the acceptance and ratification of said agreement on the part of the United States, as aforesaid, the commissioners on behalf of the United States, as required by the law under which they were appointed, had reported to the President the making of the articles of agreement aforesaid, and by way of explanation said:

"As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

"The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

"Whatever that construction is, the Indian must abide by (it). There is no appeal except to Congress. Without going specifically into details the Cherokees claim that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them. They also desire to include lands as well as money, but they were induced to eliminate 'lands' from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected."

Gen. Thomas J. Morgan, Commissioner of Indian Affairs, in his report to the Secretary of the Interior on February 6, 1892, made the following explanation and comment on the fourth section of article 2, to wit:

"The fourth section of article 2 provides for an accounting between the United States and the Cherokee Nation. The work necessary to render this account will be very heavy, and much time will be necessary to properly pre-

pare the same. On this provision of the agreement the commissioners say:

"The Government has made the accounting, has kept the books, has construed the treaties. If this has been done properly no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for legal discharge of the old ones.

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it.

"In your (the Secretary of the Interior's) reference of the matter to this office you said:

"'Particular attention is called to section 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions.'

"In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation, under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this office within a reasonable time, say, about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement herewith inclosed I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose."

The report of said commissioners was, on or about February 8, 1892, referred by the Secretary of the Interior to

the Assistant Attorney General for the Interior Department "for his consideration and report upon the legality of the contract, the sufficiency of the proposed bill, and his views upon the question(s) of law relating to the subject," and on or about February 25, 1892, said officer reported thereon, saying, among other things:

"The report and agreement were referred to the Commissioner of Indian Affairs, who, under date of February 6, 1892, reported favorably on the agreement, and transmitted with his report the draft of a bill to be submitted to Congress to ratify and carry out the provisions thereof. * * * The agreement contains two articles. The first relates to the cession and the second to the consideration therefor. * * *

"The considerations for said cession, as contained in article 2, are set forth under six subdivisions. * * *

"The fourth and next provision of article 2 of the agreement requires the United States to render to the Cherokee Nation a complete accounting of all moneys agreed to be paid to the Indians or which they may be entitled to under any treaty or act of Congress since 1817. And if said accounting is satisfactory Congress shall make the necessary appropriaton to pay the same. But if the accounting is not satisfactory, then the Cherokees to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

"I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting."

All of these reports were before the Congress when it accepted and ratified said articles of agreement by act of March 3, 1893 (27 Stat. L., 641), in the following language, to-wit:

"Which said agreement is fully set forth in the message of the President of the United States, communicating the

same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the 'Cherokee Outlet;' and said agreement is hereby ratified by the Congress of the United States, subject, however, to the Constitution and laws of the United States and the acts of Congress that have been or may be passed regulating trade and intercourse with the Indians, and subject also to certain amendments thereto, as follows:

* * * (Amendments not important here.) * * *.

"And the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States; provided that the money hereby appropriated shall be immediately available, and the remaining sum of eight million three hundred thousand dollars, or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal installments, commencing on the fourth day of March eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated;"

* * * * * *

"The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement, as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands;"

* * * * * * *

"And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become, and be taken to be and treated as a part of the public domain.

Finding of Fact No. XVIII, R., 102–107.

By the same act the sum of five thousand dollars, or so much thereof as might be necessary, was appropriated to

enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement.

Thereafter James A. Slade and Joseph T. Bender were employed as experts under said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was by the Secretary of the Interior referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted was accepted by the Cherokee Nation by an act of its national council approved December 1, 1894, and no suit was there after brought by the Cherokee Nation against the United States charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its national council above referred to, notified the Secretary of the Interior of the acceptance by said nation of said account as so stated by Messrs. Slade and Bender, and requested said Secretary of the Interior to notify the Congress of the United States of such acceptance, and on the 7th of January, 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

"SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3,

1893 (27 Stats., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–'36, 1846, 1866 and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of Cherokee national council accepting such accounting.

"The Speaker of the House of Representatives."

Finding of Fact No. XIX, R., 107.

The report and accounting made by said James A. Slade and Joseph T. Bender, referred to in the foregoing findings, is in the words and figures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

"The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement [a number of demands made by the Cherokee Nation were disallowed] and the result of the finding is submitted in the following schedule:

"Under the treaty of 1819:	
Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'school' fund.....	$2,125.00
With interest from February 27, 1819, to date of payment.	
"Under the treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund.....	1,111,284.70
With interest from June 12, 1838, to date of payment.	
"Under the treaty of 1866:	
Amount received by receiver of public moneys at Independence, Kansas, never credited to the Cherokee Nation.	432.28
With interest from January 1, 1874, to date of payment.	

"Under act of Congress of March 3, 1893:

Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund.....	20,406 25
With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds held in lieu of investments.	

JAS. A. SLADE.
JOS. T. BENDER."

Finding of Fact No. XX, R., 108

Neither the whole nor any portion of the various sums with interest found and stated by the concluding schedule of the so-called Slade-Bender report to be due to the Cherokee Nation under the treaties and acts of Congress therein referred to have been paid to the Cherokee Nation or to any officer, agent, or other person acting in its behalf.

With the exception of the provision contained in the act of March 2, 1895, making appropriations for the legislative, executive, and judicial expenses of the Government, directing the Attorney General to review and report upon the conclusion of law disclosed in the account of Slade and Bender, and the passing of the provisions of the acts of July 1, 1902, and March 3, 1903, conferring jurisdiction upon the United States Court of Claims to hear and determine these causes, the Congress has taken no action whatever with respect to the said account of Slade and Bender or the amounts found due thereunder.

Acting under said direction of March 2, 1895, above referred to, the Attorney General of the United States, on December 2, 1895, addressed a communication to the Congress wherein he advised that body of his disagreement with the conclusions reached by said Slade and Bender. Said communication of the Attorney General was, on December 2, 1895, by the Congress referred to the Committee on Indian

Affairs and ordered to be printed, and the same appears in Senate Executive Document No. 16, Fifty-fourth Congress, first session, Finding of Fact No. XXII, R., 109.

CONCLUSIONS OF LAW.

Upon the foregoing facts the Court of Claims concluded as matters of law:

First. That the United States is indebted to the Cherokee Nation in the following amounts, viz:

(1.) The sum of $2,125, with interest at 5 per cent. from February 27, 1819, to date of payment;

(2.) The sum of $1,111,284 70, with interest at 5 per cent from June 12, 1838, to date of payment;

(3.) The sum of $432.28, with interest at 5 per cent. from January 1, 1874, to date of payment;

(4.) The sum of $20,406.25, with interest at 5 per cent. from July 1, 1893, to date of payment.

Second. The proceeds of so much of said judgment as pertains to the items numbered 1, 3, and 4 equitably belong to the Cherokee Nation as a political or social body, and such proceeds, less any proportion thereof which the Cherokee Nation may have contracted to pay on account of counsel fees and other expenses of this litigation, should be paid or disposed of as follows, viz:

(a.) The amount represented by item numbered three (3) for $432.28, and interest, should be paid to the treasurer o the Cherokee Nation, or to such other person or officer either of the nation or of the United States as may hereafter succeed to his duties;

(*b*.) The amount represented by item numbered one (1) for $2,125, and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the principal of the "Cherokee school fund," of which fund the United States are trustees;

(*c*.) The amount represented by item numbered four (4), for $20,406.25 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the "Cherokee national fund," of which fund the United States are trustees;

(*d*.) The amount represented by item numbered two (2) for $1,111,284.70 and interest, less counsel fees and expenses, equitably belongs to the Eastern and Western Cherokees who were parties either to the treaty of New Echota, proclaimed May 23, 1836, or the treaty of Washington, of August 6, 1846, as individuals, whether east or west of the Mississippi river, and should be paid to them or to their legal representatives by the Secretary of the Interior.

Third. Such counsel fees as may have been contracted to be paid by the Cherokee Nation in the manner prescribed by sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and such other counsel fees and expenses as may be allowed by this court pursuant to the provisions of the act of March 3, 1903, set forth in Finding of Fact No. 1, should be paid to the parties entitled to receive the same by the Secretary of the Treasury upon the making of an appropriation by Congress for the payment of the judgment in this cause.

Fourth. The cost and expenses incident to ascertaining and identifying the individuals entitled to participate in the distribution of the balance of the amount represented by item numbered two (2), and the making of the distribution thereof, should be a charge upon such balance for distribution and should be deducted therefrom.

ARGUMENT.

As to the liability of the United States to the Cherokee Nation:

First, as upon an account stated:

Second, as upon existing treaty stipulations apart from the account stated.

Prior to the year 1808 the Cherokee Nation of Indians composing a single independent tribal community, governed by chiefs, headmen and warriors, owned and possessed some 14,000,000 acres of land in the States of Georgia, Alabama, Tennessee and the Carolinas, upon which they were domiciled, and over which they roamed and hunted. The white population of those States was rapidly increasing and seriously encroaching upon the Indian lands and the fish and game upon which the Indians largely relied for subsistence was rapidly disappearing from their streams and forests.

By the agreement of 1802 between the United States and the State of Georgia, whereby Georgia ceded to the former certain territory, now forming part of Alabama and Mississippi, it was stipulated that the United States should extinguish the Indian title to lands within the State of Georgia "as early as the same can be peaceably obtained on reasonable terms," and Georgia was impatiently pressing for the fulfillment of this stipulation.

In that year, relying upon the promise of the United States to exchange lands west of the Mississippi "for a just portion of the country" which they should leave in the east, a portion of the Cherokees, subsequently (in 1819), estimated as equalling in number, one third of the whole Cherokee Nation made choice of and settled upon lands of the United

States on the Arkansas and White rivers, and subsequently through their agents, duly empowered and acting in conjunction with the chiefs, headmen and warriors of that portion of the Cherokee Nation which remained east, executed the treaty of July 8, 1817, with the United States.

By this treaty the Cherokees, acting as a whole, joined in ceding to the United States certain of their lands east of the Mississippi, "in part of the proportion of the lands east," to which the Cherokees who had removed and those who were about to remove west, were justly entitled. This exchange of lands was upon the basis of "acre for acre" according to "the just proportion due that part of the nation on the Arkansas, agreeably to their numbers." To ascertain the exact acreage to which those upon the Arkansas were entitled "agreeably to their numbers," it was agreed that a census should be taken; and to aid in the removal west the United States agreed "to furnish flat bottomed boats and provisions sufficient for that purpose."

Subsequently, by the treaty of February 27, 1819, the "chiefs and headmen of the Cherokee Nation of Indians," including both those who had removed to the west and those who remained east, in order that "the treaty between the United States and them, signed the eighth of July, eighteen hundred and seventeen, might, without further delay, or the trouble or expense of taking the census, as stipulated in the said treaty, be finally adjusted" ceded to the United States "a tract of country at least as extensive as that which they probably are entitled to, under its provisions," and the lands so ceded were accepted by the United States "in full satisfaction of all claims which the United States have on them (the Cherokee Nation), on account of the cession (of the lands west) to a part of their nation who have, or may hereafter, emigrate to the Arkansas." This treaty constituted "a final adjustment of that of the eighth of July, eighteen hundred and seventeen."

Under those two treaties the Indians who removed to the Arkansas paid their own removal expenses and surrendered for the lands west, upon which they settled, their undivided interest in the lands which they had left in the east, acre for acre. The Cherokees who remained east contributed nothing of value, either in lands or money, on account of this removal of their brothers west.

In 1828 difficulties arose with respect to the Cherokees west, by reason of settlers in the Territory of Arkansas encroaching upon their lands; and on May 6, 1828, the Cherokees west, acting through their proper authorities, made a treaty with the United States, by which they surrendered their lands on the Arkansas and White Rivers in exchange for 7,000,000 acres of other lands, all west of the western boundary of Arkansas, within specified boundary limits, and a (the) free and unmolested use of all the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States and their right of soil extend."

To compensate the Western Cherokees for "the inconvenience and trouble attending the (this) removal, and on account of the reduced value of a great portion of the lands herein ceded to the Cherokees, as compared with that of those in Arkansas which were made theirs by the treaty of 1817 and the convention of 1819," the United States agreed to pay, and did in fact, pay to the Western Cherokees after their second removal, the sum of $50,000 and an annuity for three years of $2,000 to defray the expense of recovering straying cattle, the further sum of $8,760 for spoliations, a further annuity of $2,000 a year for ten years to be used for educational purposes and $1,000 on account of the purchase of a printing press and type. The Cherokees east were not parties to this treaty, but there was recited in its preamble the anxious desire of the United States to secure to the Cherokee Nation of Indians, both those living in Arkansas and

"those of their friends and brothers who reside in States east of the Mississippi and who may wish to join their brothers of the West, a permanent home." Article 8 of said treaty also recited that in order that those Indians "yet remaining in the States may be induced to join" their brothers west, the United States in addition to certain other recited inducements would bear "the cost of the emigration of all such" and would open "good and suitable ways" and make provisions for their comfort, accommodation, and support by the way "and provide provisions for twelve months after their arrival at the agency."

At the date of this last mentioned treaty the Cherokees west had received neither lands nor money from the United States on account of their removal, except, of course, the lands west of the Mississippi for which they had fully paid by the cession of their own lands in the States east, acre for acre.

No phrase of the treaty of 1828 can fairly be tortured into a recognition by the Cherokees west, of any right or interest in their lands west of the western boundary of Arkansas on the part of those Cherokees who had remained in the east.

By the treaty of February 14, 1833, the Cherokees west, at the instance of the United States, consented to a change in the boundaries of the lands ceded to them by the treaty of 1828, and the United States, besides renewing their guarantee and pledge of the Western Cherokees of the 7,000,000 acres of land and the perpetual outlet west, also agreed to issue to said Cherokees west, letters patent "as soon as practicable for the lands hereby guaranteed."

By article 5 of this treaty it was expressly stipulated that it should not "vary the rights of the parties to" the treaty of 1828 "any further than said treaty is inconsistent with the provisions of this treaty now concluded."

The treaty of December 29, 1835, commonly referred to as the "Treaty of New Echota," was executed between the

United States and certain members of the Cherokee Nation east, who are sometimes referred to as the "Treaty party" or "Ridge party." This party was but a small minority of the nation east, and though the treaty on its face purported to have been made between the United States and the "chiefs, headmen, and people of the Cherokee tribe of Indians," it was promptly and until 1846 persistently repudiated by both the eastern and western branches of the nation.

March 6, 1835, the Senate of the United States had advised that a sum not exceeding five millions of dollars should be paid to the Cherokee Indians "for all their lands and possessions east of the Mississippi river."

Article 1, of the so-called Treaty of New Echota, provided for the cession by the Cherokee Nation of all their lands "east of the Mississippi river" and the release of all of their claims upon the United States, "in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles"—

Article 2, recited a fear that the lands west of the Mississippi guaranteed by the United States under the treaty of May 6, 1828, and supplemental treaty of February 14, 1833, "to be conveyed by patent 'to the Cherokee Nation of Indians,'" would not comfortably accommodate "the whole nation on their removal west," wherefore, the United States, in consideration of $500,000 to be deducted from the above purchase price of $5,000,000 agreed to convey to said Indians, by patent, in fee simple, "a further tract of land, estimated to contain 800,000 acres," which lands together with "the lands ceded by the treaty of February 14, 1833, including the outlet" "should be included in one patent executed to the Cherokee Nation of Indians, by the President of the United States."

By article 8 of this document the United States agreed

"to remove the Cherokees to their new homes and to subsist them one year after their arrival there." Persons and families capable of subsisting and removing themselves were to be permitted to do so and were to "be allowed in full of all claims for the same, twenty dollars for each member of their family and, in view of their one year's rations," were to "be paid the sum of thirty-three dollars and thirty-three cents" should they prefer it. Cherokees residing outside of the nation who should remove west of the Mississippi within two years thereby became "entitled to an allowance for removal and subsistence as above provided."

Article 15 of this treaty provided, "that after deducting the amount actually expended for * * * removal, subsistence * * * the balance whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed."

Article 16 required the Cherokees east to remove to their new homes within two years from the ratification of the treaty, and article 17 provided that

"all stipulations in former treaties which have not been "superseded or amended by this, shall continue in full force "and effect."

Before the ratification of this treaty by the Senate the attention of the Indians was drawn to the inclusion of the word "removal" in article 15 thereof, and they immediately protested that such inclusion was erroneous and contrary to their understanding of the bargain, and thereupon, the President, on March 1, 1836, submitted to the Senate, for its consideration, supplementary articles, the second of which recited that the Cherokees had supposed that the sum of $5,000,000 fixed by the Senate as the value of the Cherokee lands and possessions east of the Mississippi, "was not intended to include the amount which may be required to remove them" * * * which suggestion has been confirmed by the opinion expressed to the War Department by

some of the Senators, who voted upon the question" and the President is willing that "if it was not intended by the Senate that the above mentioned sum of five millions of dollars should include the objects herein specified, that in that case such further provision should be made therefor, as might appear to the Senate to be just." The third of said supplementary articles read in part as follows:

"It is, therefore, agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people *to include the expense of their removal* * * * This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund."

The treaty as originally drafted and including these supplementary articles was ratified and adopted as a single instrument by the Senate and proclaimed May 23, 1836. This treaty is sometimes referred to as the treaty of 1835–1836.

Pursuant to the third article of the supplementary articles, above referred to, the Congress on July 2, 1836, appropriated the sum of $600,000 to be expended as therein provided, and it being the then understanding that this amount would more than pay for spoliations and the cost of removal, it was provided that any surplus which might remain after payment of such expenses should be applied to the national educational fund. It very shortly transpired that the estimate of cost of removal had fallen far short of the reality, and that although prior to 1838 but a small body of the Indians east, scarcely 2,000 in number, had been induced to remove west the $600,000 had become greatly depleted by the expenses incident to such removal. When preparations were begun in May, 1838, by the Government, to compel the removal of the Indians to the west by the use of military force, the House of Representatives made inquiry of the Executive Department as to the probable additional amount

which would be necessary to defray the removal expenses of the remaining Cherokees to the west, and on May 25, 1838, the Secretary of War advised Congress that in his view the further sum of $435,900 would be required for such purpose, and if it was intended to pay to the Indians subsistence for one year after their arrival in the west the further sum of $611,147.00, should be added thereto, making a total of $1,047,067.00, and on June 12, 1838, the Congress appropriated the full amount so estimated by the Secretary of War, the same to be "in full for all objects specified in the third article of the supplemental articles of the Treaty of 1835" and "for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of said sum of money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty.

It was undoubtedly to these two appropriations, already made, that General Scott referred when on August 1, 1838, in response to the proposal of the Cherokee delegates to undertake the removal of said Indians to the west at an estimated expense of $66.24 per capita, he replied to said delegates that the estimate was extravagant, and "the whole expense of the emigration is to be paid out of the appropriations already made by Congress, the general surplus of which is to go to the Cherokee Nation in various forms," and on August 2, 1838, after the delegates had adhered to their estimates "with a slight increase for soap," he again wrote, "as the Cherokee people are interested in the expense as well as the comfort of the removal I do not feel myself at liberty to withhold my sanction."

The deduction which the learned Assistant Attorney General seeks to draw from the correspondence with General Scott in this connection and his deposition subsequently given thereabouts, to the effect that the Cherokees distinctly understood that the expense of the removal was to be borne by them and if it exceeded the amount specifically appropri-

ated for that purpose was to be deducted from the so-called treaty fund, is a *non sequitur*, for it does not appear that the Indians had ever been advised that the appropriation of $600,000 had been practically exhausted or that the total cost of the removal, at the estimated per capita of $66.24, would not in fact fall within the total of the two sums appropriated as above for that purpose. In any event, if the treaty itself, including the supplementary articles, operated as an agreement on the part of the United States to pay the expenses incident to the removal west, the mere fact that the Congress appropriated an insufficient sum for that purpose, irrespective of whether the contracts for the removal were in fact made judiciously or otherwise, would not operate to change the practical relations of the parties under the provisions of the treaty itself unless the intention to alter the terms of the treaty was evidenced by conditions equal in solemnity to those which surrounded the making thereof.

The total cost of the removal of all Eastern Cherokees to the west was $1,495,485.92, an amount distinctly less than the sum of the $600,000 and the $1,047,067.00 appropriated July 2, 1836 and June 12, 1838, respectively, for this among other purposes, and notwithstanding the fact that the appropriation of $1,047,067.00 of July 12, 1838, contained the specific item of $435,900.00 for the specific purpose of removal, but $49,095.31 was drawn from that appropriation for such purpose, and but $335,105.91 was drawn from the $600,000 appropriation of July 2, 1836, while the enormous sum of $1,111,284.70, necessary to defray the balance of the removal expense, was deducted from the $5,000,000 agreed to be paid to the Indians for their lands and improvements.

With this grievance fresh upon them and at a time when the attention of the Indians had been sharply drawn to the possibility of the United States attempting to make the treaty fund bear the expense of removal, the two branches of the Cherokee people acting through their high executive

officers entered into an "Act of Union between the Eastern and Western Cherokees" on the 12th day of July, 1839, (erroneously reads 1838 on pages 1 and 91 of the Record,) whereby "The people composing the Eastern and Western Cherokee Nation, in national convention assembled," solemnly agreed "to form themselves into *one body politic under the style and title of the Cherokee Nation*," and further declared that in view of the Union now formed "*all rights and titles to public Cherokee lands on the east or west of the River Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from other sources, shall hence forward vest entire and unimpaired in the Cherokee Nation as constituted by this Union.*" By the constitution adopted on the 6th of September, 1839, by the Cherokees who had also agreed upon the Union, it was declared that "*The Eastern and Western Cherokees* had become reunited *into one body politic* under the style and title of the Cherokee Nation," and that "the lands of the Cherokee Nation shall remain common property," and at a meeting of the Cherokee people held at Tahlequah in the Cherokee Nation, on January 16, 1840, it was publicly declared that "the people of the Cherokee Nation having assembled under this call" * * * "do hereby approve, ratify and confirm the said Act of Union and the Constitution and acknowledge and make known that the government based upon this act and this Constitution is the legitimate government of the Cherokee Nation and of our choice, and it has both our confidence and our support."

Thereafter, many disputes arose between factions within the Cherokee Nation, and much rioting and disorder resulted therefrom; as the result of which the United States on August 6, 1846, entered into a treaty with delegates representing the former bodies of the Eastern and Western Cherokees whereby it was recited that serious difficulties had theretofore

existed between the different portions of the people now "constituting and recognized as the Cherokee Nation of Indians," and that "certain claims existed on the part of the Cherokee Nation and portions of the Cherokee people against the United States," and with a view to the settlement of these claims and to the making of "the Eastern and Western Cherokees parties to the Treaty of New Echota, which they had never conceded themselves to be," it was agreed by article one thereof, "that the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit;" and by article IV it was declared,—and by assenting thereto the Indians themselves for the first time recognized the suggestion as well founded—that the Western Cherokees by the Treaty of 1828 did not acquire exclusive title to the territory ceded to them by that treaty, but that said lands were "intended for the use of and to be the home for, the whole Nation," and that by "the equitable operation of the same treaty, the Western Cherokees acquired a common interest in the lands occupied by the Cherokees east of the Mississippi, which interest should have been provided for in the Treaty of 1835, but it was not, except in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be, and a method of ascertaining such value was prescribed. In consideration of the payment of the sum thereby ascertained to be due the Western Cherokees quit-claimed to the United States all right and title which they had in and to the lands east and their claim to exclusive ownership in the lands west, it being further provided in said article, that the lands west of the Mississippi, including the 800,000 acres of additional lands ceded by the United States under the Treaty of 1835, should "be and remain the common property of the whole Cherokee

people." Article 9 of said treaty, evidenced the agreement of the United States "to make a fair and just settlement of all moneys due to the Cherokees and subject to the *per capita* division under the treaty of 29th, December, 1835," provided a method for ascertaining the amount so due, and provided for its payment *per capita* to "those Cherokees residing East at the date of said treaty and the supplement thereto."

In each case in ascertaining the amount due and to be paid over to the Indians, it was provided by the methods of settlement adopted by the treaty that expenses of removal and subsistence should be credited to the United States, and the settlements were made upon such basis, but by article 11 of the treaty the question as to whether the cost of subsistence should be borne by the Indians "and also the question whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date, and at what rate per annum" was submitted to the Senate of the United States for its decision. Upon this submission the Senate, acting as umpire on September 5, 1850, passed a resolution, declaring in effect that the cost of subsistence had been improperly deducted from the treaty fund and that it was

"the sense of the Senate that interest at the rate of five per cent. per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid." (Sen. Journal, 31st Cong., 1st sess., p. 602.)

Thereupon the accounting officers prepared for settlement the accounts provided for by the fourth and ninth articles of said Treaty of 1846 from which it appeared that there was due from the United States to the Western Cherokees the sum of $532,782.18, and to the Eastern Cherokees the sum of $914,026.13, and these amounts together with interest thereon at the rate of 5 per centum per annum from June 12, 1838, were appropriated by Congress by the Acts of September 30, 1850, and February 27, 1851, respectively, and

said amounts were properly distributed to the Eastern and Western Cherokees *per capita.*

Prior to the making of any distribution of either of said amounts, the Cherokee National Council made a formal statement of the national claims arising under the Treaties of 1835 and 1846, and protested against the above mentioned settlement accounts, because, among other reasons given,

"no allowance is made for the sums taken from the treaty fund for removal to the west, although that charge depended on precisely the same words in the Treaty of 1835 as did the one year's subsistence, and the Senate unanimously decided on the question submitted to them as arbitrators that the item of subsistence was not a proper charge upon the Cherokee fund." (R., 98.)

Afterwards the amounts with interest as appropriated by Congress were distributed *per capita*, to and receipted for, by both the Western and Eastern Cherokees, individually, in full of all demands under the Treaty of August 6, 1846, according to principles established in the fourth and ninth articles thereof, respectively; but the Cherokee Nation upon the payment of said money did not execute or deliver to the United States a full and final discharge for its demands upon the United States, under said treaty, although required so to do, by the Act of February 27, 1851, making appropriation for the amount due to the Eastern Cherokees *per capita.*

Subsequently, and notwithstanding the receipts in full, and final discharges signed as aforesaid, the Western Cherokees, by the Act of February 29, 1889 (25 Stats., 694), were authorized to bring suit in the Court of Claims for a further balance alleged to be due to them upon the treaty stipulations; and upon appeal to this court, the further sum of $216,556.20, with interest on $212,376.94 thereof, from June 12, 1838, at 5 per cent. was adjudged to be due to them and the total amount was subsequently appropriated and paid.

By article 15 of the Treaty of 1866, between the United States and the Cherokee Nation, provision was made for the settlement by the United States, "on the unoccupied lands east of the 96th meridian, west longtitude" and within the Cherokee country, of civilized Indians, friendly with the Cherokees, upon payment in the event of the surrender of their tribal relations, "unto the Cherokee national fund a sum of money" proportioned upon the numbers which the "tribe so settled bore to the entire number of the Cherokee Nation;" it being further stipulated that if the Indians so settled desired to preserve their tribal relations, they should not only contribute, in like manner to the national fund, but should also pay for the lands allotted to such tribe. Under this provision, by virtue of agreements made between them and the Cherokee Nation, the Delawares, Shawnees, Poncas, Nez-Perces, Otoes, Missourias and Pawnees, were located upon the lands of the Cherokees and paid to the latter the varying amounts provided for thereby.

From November, 1851, to June 30, 1889, nothing was done upon the part of either the Cherokees, or the United States, which tended to alter in any aspect their relative attitudes towards the claim of the former against the latter for the sum of $1,111,284.70 and interest thereon from June 12, 1838, until paid. In addition to this item the Cherokee Nation had from time to time assiduously pressed other claims against the United States, arising out of other treaty stipulations and under acts of Congress.

Upon the last mentioned date, the Congress authorized the appointment of Commissioners to negotiate with the Indians for the cession to the United States of their title or interest in the lands lying west of the ninety-sixth degree of longitude in the Indian Territory, and on November 16, 1891, the Cherokee National Council authorized the appointment of commissioners to meet and enter upon such negotiations with them.

At the outset of the negotiations "the comissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as "a condition precedent to any agreement for the sale of the land, that some adjustment of such contentions should be made." (R., 103.)

As a result of such contentions and demand, provision was made by the second article of the agreement of December 19, 1891, for the rendition by the United States to the Cherokee Nation of "a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835-36, etc.," and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and it was further provided in said article, that if it should appear "upon such accounting, that any sum of money has been (so) withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting." (R., 103-104.)

It was further provided in said paragraph that if the Cherokee Nation when said accounting had been rendered should conclude that such accounting was incorrect or unjust, then it should have the right within twelve months after such rendition "to enter suit against the United States in the Court of Claims * * * for any alleged or declared amount of money promised, but withheld by the United States from the Cherokee Nation * * * which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting." * * *

The articles of agreement containing the above among other stipulations were accepted and ratified on the part of the Cherokee Nation, January 4, 1892, and on the part of the United States by the Act of Congress of March 3, 1893, (27 Stats., 640) which, in addition to ratifying said agreement appropriated the sum of $5,000 "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article two of said agreement."

How would it be possible to more definitely provide for the stating of an account covering a series of past monetary transactions between the parties, or to more certainly promise to pay any balance which upon such accounting might be found to be due from the United States on the one part to the Cherokee Nation on the other.

What more perfect example of the true definition of an account stated could be imagined than was presented by the account prepared by Messrs. Slade and Bender, under the supervision of the Commissioner of Indian Affairs and the Secretary of the Interior, and thereafter in strict accord with the requirements of the Act of March 3, 1893, rendered to the Cherokee Nation, through its accredited representative and after full examination by formal vote of its national council accepted by said nation as correct. That the obligation of the United States to pay the amount shown on the account so stated and rendered to be due to the Cherokee Nation became absolute when the nation formally notified the Secretary of the Interior of its acceptance, accompanied with the request that he should so notify the Congress and ask for an appropriation to cover the amount admitted to be due, would seem to be beyond dispute.

The fact that by the act providing for the accounting, there was reserved to the nation the right in the event of dissatisfaction with the accounting upon its part to apply

to the courts for an adjudication of its contentions, does not militate against the claim that the transaction between the parties constituted an account stated, in which all prior transactions and claims became merged, and which subject to impeachment only upon the ground of fraud or mistake fastened upon the United States the obligation to pay the balances shown to be due. In every instance of an account stated it must affirmatively appear that the balance shown was mutually arrived at, as by *insimul computassent*, or that the account prepared and rendered by one was either expressly or impliedly assented to or accepted as correct by the other. In such case the law, when necessary, will imply a promise to pay the balance shown by the account to be due from the one to the other, but where as here, the debtor, in advance, expressly agrees to pay such amount as upon its own showing will be found to be due to the creditor all question as to both the obligation and the duty to pay would seem to disappear.

A curious misapprehension seems to have prevailed in the court below as to what in law constitutes an account stated. It is not a fact as is suggested in one of the majority opinions that in such case the account must be presented by the creditor and accepted by the debtor, nor is it true that the doctrine of account stated is only applicable to dealings with or between merchants, nor is it true that in the case at bar the account sued upon "was merely rendered" as contradistinguished from rendered and accepted. The account here sued upon was rendered by the party stating it to the other party to the transactions covered by it, who expressly accepted it as correctly stating their respective rights and obligations.

An account stated is defined to be an agreement between persons who have had previous transactions fixing the amount due in respect of such transactions.

In such case the law will imply a promise to pay the bal-

ance shown thereby to be due, and an express promise to pay is not necessary.

Trueman *vs.* Hurst, 1 Term Rep., 40; Lord Mansfield.

It is not necessary that there should be cross or mutual demands. The defendant's acknowledgment of a sum due from him to the plaintiff, need not relate to more than a single debt or transaction,

2 Chitty on Contracts, 11 Am. Ed., p. 962.

It is not necessary that the agreement should be signed by the parties and it may have been rendered by the debtor to the creditor.

Toland *vs.* Sprague, 12 Peters, 300.

As said by Mr. Justice Barbour, speaking for this court in the last cited case (p. 334):

"We agree that the mere rendering of an account does not make it a stated one; but that if the other party receives the account, admits the correctness of the items, claims the balance or offers to pay it as it may be in his favor or against him, then it becomes a stated account. The plaintiff having received it, having made no complaint as to the balance or the items, but on the contrary having claimed that balance, thereby adopted it, and by his own act treated it as a stated account;"

An I. O. U. in defendant's handwriting, not addressed to any one but produced by plaintiff is *prima facie* evidence of an account stated with him; Douglass *vs.* Holme, 4 P. & D., 685 and is conclusive upon the parties unless the defendant affirmatively shows fraud or mistake,

Philips *vs.* Belden, 2 Edwards Chancery, p. 1.

It is as if a promissory note had been given for the balance,

Loventhal *vs.* Morris, 103 Alabama, 336.
Bass *vs.* Bass, 8 Pickering, 187.
Dunhon *vs.* Griswalk, 100 New York, 224.
Comer *vs.* Way, 107 Ala., 300; 54 Am. St. Rep., 95.
Wharton *vs.* Anderson, 28 Minnesota, 301.
Lockwood *vs.* Thorne, 11 New York, 170; 62 Am. Dec., 81 and note.
Laycock *vs.* Pickles, 4 B. & S., 497; 1 Eng. Ruling Cases, 425.

This case differs in all essential particulars from that of Nutt *vs.* United States, 125 U. S., 650, where the account stated by the quartermaster-general was not submitted to the claimant as a correct statement of indebtedness, nor was there any promise to pay such amount, either express or implied.

In the case at bar the account is not attacked upon the ground of fraud or mistake. The defense revolves around an attempt to litigate an item once settled and agreed upon between the parties, without a shadow of pretense that there was anything unfair in the settlement, or any misapprehension in regard to it. The consideration for the rendering of the account sued upon viz. the vast domain of the Indians passed from the Cherokee Nation to the United States in 1893 and no suggestion by the latter of restoring the *status quo* is heard from any quarter. What a mockery did the fourth subdivision of article II of the Agreement of 1891 constitute if the contention of the learned Assistant Attorney General thereabouts shall prevail.

His copious argument upon the proposition that the accountants exceeded their authority, in construing for themselves the terms of the various treaties and statutes specified in said article, and applying the same to the figures evidenc-

ing receipts and expenditures as found in the books of account in order that the promise of the United States to render a just accounting of the transactions between it and the Indians, growing out of said treaties and statutes, might be kept to the hope as well as to the ear, fades away, dissolves and disappears when tested by the terms of the agreement of 1891, and the Act of 1893, themselves. It is no better bottomed than is the suggestion to be found in the concurring opinion of one of the justices of the court below, that in finding the United States to be indebted to the Cherokee Nation in the amount of the item here in question, the accountants had but proceeded upon the *assumption* that the United States were to pay removal expenses without warrant of law therefor, although the same learned justice reviewing the self same treaties reaches the self same conclusion without recourse to any assumptions whatever.

It seems to be but fair to the accountants and to the Secretary of the Interior who accepted and by his acts at least impliedly approved their report to say, that in no just sense can their conclusions be said to depend upon *assumptions*, either of law or fact, although at one point in their elaborate report in the course of discussion the word "assumption" is used (p. 25). The inference and argument which is sought to be deduced from such use of the word is completely negatived by the continued perusal of the discussion of the same items of account appearing elsewhere in their report.

The suggestion that it was intended by the Congress when it appropriated the $5,000 in 1893 "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to *properly* render a *complete* account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article two of said agreement," that the activities of such "expert persons" should be limited to reproducing the accounts in the precise form in which they then

stood upon the account books of the Government is equally without foundation. It may reasonably be contended that the Indians themselves could have produced from their own sources such a transcript of the accounts, as they had been actually kept. If nothing more than the reproduction of the many accounts in convenient form was intended, copyists and not "expert persons" would doubtless have been specified by the appropriation act. The fourth paragraph of article 2 of the agreement of 1891 stipulates not for a transcript from the account books, but it expressly provides for the rendering of "a complete account of moneys due the Cherokee Nation" under the treaties and acts of Congress therein specified.

Upon the theory of accounting adopted by the Government accountants prior to 1903, everything due to the Indians had been paid to them and their receipts and discharges in full based upon such theory reposed in the Department of the Interior. It is true that the "expert persons," Slade and Bender, might have adhered to the theory of accounting theretofore adopted if upon examination they had found it to be correct, but in that case the Indians had the reserved right to resort to the Court of Claims to dispute the result; but the act of 1903 distinctly recognized the possibility of such accountants departing from the theories and views of those who had theretofore settled the accounts with the Indians, for it provided that "if it shall be found upon such accounting that any sum of money has been" withheld, the amount should be appropriated by Congress, payable to the Cherokee Nation.

The contention of the Indians had all along been that upon a proper interpretation of the treaties they should not be charged with the item for removal expenses. Unless the "expert persons" were intended and expected to re-examine and reconstrue the treaties in question for themselves how could it be ascertained whether such contention was correct?

The parties to the agreement of 1891 clearly understood that the account therein provided for was only to be stated and rendered after a re-examination of the terms of the treaties themselves. The commissioners on part of the United States voicing this understanding, when reporting to the President, said:

"The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government. * * * The Cherokees claim that upon a just accounting, *upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found to be due to them.* * * * The Government has made the accounting, has kept the books, *has construed the treaties. If that has been done properly,* no harm can come from restating the account. *If it has not been done properly, no possible reason can exist why the error should not be corrected*" (R., 104).

This report was before the executive officers of the Government and the Congress when the act of March 3, 1893, above referred to, was enacted.

Messrs. Slade and Bender, in reviewing the treaties in question and restating the accounts long before settled in the light of such review, did only what the Secretary of the Interior, the Congress, and the Cherokee Nation intended and expected them to do.

It is not necessary to dispute as to whether the liability of the United States to the Cherokee Nation with respect to the item here in controversy depends upon an account stated, or upon an award or upon a contract of sale to recover purchase money owing for lands conveyed. Each hypothesis would be sufficient to support more or less convincing arguments tending to compel the affirmance of the judgment of the trial court.

But the determination of such questions is not essential to the decision of this case. This suit proceeds upon the

express promise of the Government to pay a sum to be ascertained in the manner specified, the consideration for which promise the Government has received and enjoyed. Whether the manner specified for ascertaining the sum contracted to be paid, shall be called an arbitration or an account stated, cannot affect the validity nor the binding quality of that contract. If the Slade and Bender report did not create an express obligation to pay the amount found to be due, it at least, ascertained and fixed the amount to be paid under an existing express contractual obligation.

The particular nomenclature is immaterial. The conclusiveness of the settlement of 1893 is apparent. It cannot be denied that, at the time of the negotiations of 1891, there was, and for many years had been a controversy between the United States and the Cherokee Nation with regard to amounts of money claimed by the nation and disputed by the United States.

Therefore, before the nation would part with its lands it demanded as a condition precedent thereto, that there should be a settlement of the differences and payment of such amount as might be found due. The United States acceded to this demand and agreed to submit its own accounting and to pay such sum as might be shown to be due thereby.

The United States accounted to the Cherokee Nation through its proper agent. The Cherokee Nation through its council and chief accepted, and so advised the Interior Department, and this department in turn reported the conclusion of the entire transaction to Congress for action. Could the agreement and its results have been more exhaustive, regular or conclusive?

A. says to B.: "You claim certain sums from me; I dispute some or all of them; you have certain lands which I want to buy, and which you decline to sell; I will agree to pay you a certain sum of money for these lands, and will agree further to render you a statement of what I think I owe you, you to have the right to accept my statement, or

to appeal to the courts for final adjudication." B. accepts the offer, conveys the land, takes his money, and awaits the statement. In due time the statement is rendered, and B. accepts it. Would a court hesitate to enforce the payment of that demand? Would a court permit further inquiry, upon any ground, to either party? Has not the demand with all its history and contention, been determined by this final action? The land was sold for so much money, and for the right and privilege to have a statement submitted for acceptance, or investigation by the courts, as the claimant might elect.

Here lies the consideration. The privilege to have this statement made with the right to accept or reject, was bought, and the acceptance of the statement is as conclusive as the acceptance of an offer can be made. The mutuality of the bargain is perfect, and there is no escape from its consequences. This was not a mere reference for decision, it was a contract based upon consideration to render a statement of obligation, subject to acceptance, coupled with a promise to pay, if accepted.

This is precisely the situation between the United States and the Cherokee Nation in this case with this exception, that the United States occupies the position of a guardian and the Cherokee Nation that of a ward; and if anything can be added to the sanctity of a contract, the obligation on the part of the United States to abide by the consequences of this particular bargain, is correspondingly increased.

The Cherokee Nation, by the agreement of 1891–1893, surrendered to the United States all of its title and interest in and to the vast domain therein described. The United States accepted the cession and entered upon and now maintains possession of the estate, and by all known rules of law and equity are doubly bound to pay in full the consideration which, as the agreed purchase price, they promised to pay.

The United States, having entered into possession of the lands sold, cannot refuse to perform in full and according to the letter the obligations which it assented to and which were imposed upon them by the terms of the instrument of sale.

In all essential features the transaction of 1891–1893 was, if possible, more binding than an account stated. It embodied every element of a present contract of sale. There were parties, the object of barter, and an express promise to pay a definite consideration therefor.

With regard to this the Court of Claims, through Mr. Chief Justice Nott, says:

"In the opinion of the court this case is simply one to recover purchase-money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be delivered until the purchase-money is paid, or secured, or, at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase-money should be paid soon. But, nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase-money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a case of sale and delivery and non-payment of the purchase-money for the thing sold and delivered."

It seems difficult to conjure up objections to the obligations of the United States to pay the amounts contained in the Slade and Bender statement, adopted and reported by the Interior Department, and accepted by the Cherokee Nation.

What was disallowed, the nation has lost. What was allowed, belongs to the Cherokee Nation. When resolved into its essential elements, every requirement of the rules of contract has been complied with except that of payment to discharge the amount due.

To say that Congress wished to provide for an accounting which would bind neither party, which would adjust nothing, is to say, that it meant to do a useless and senseless thing, or that it was its purpose to inveigle the Indians into parting with their lands upon the strength of a promise never intended to be kept. Neither can be attributed to Congress. To say that the finding was not to be conclusive would be entirely inconsistent with the alternative clause giving the Cherokee Nation the right to sue. If the accounting was not to merge into itself the matter of difference, if it was to be impotent, then there was no reason for its incorporation and the clause relative to the suit should have been the only provision.

Nor can it be said that the refusal of the Government to pay in this case is unusual or should be in any sense accepted as the assertion of a right to which it regards itself fairly entitled. It is an ordinary case of an ordinary wrong in dealing with the Indians. One of the most caustic expressions found in judicial comment is the language of Chief Justice Marshall, who, speaking of this tribe, said:

"A people once numerous, powerful and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath, our superior policy, our arts and our arms, have yielded their lands by successive treaties each of which contains a solemn guarantee of the remainder."

Due "regard to the honor and justice of a great Republic alike forbid the imputation of a desire that its legislation should be so construed and its law so administered" that the Cherokee Nation of Indians should be deprived of the fruits of the settlement clause of the agreement of 1891-1893.

INTEREST.

Upon the basis of an account stated, the affirmance of the judgment of the court below as to principal necessarily requires the affirmance of the allowance for interest; for the account, which was submitted by the United States to the Cherokee Nation as a correct statement of indebtedness admitted to be due from the former to the latter, admitted liability for interest. It is of no consequence that the failure of the debtor to pay what was long ago admitted to be due has resulted in so swelling the interest account that it exceeds in importance and amount the sum of the principal itself. The admission by the United States of liability to pay interest from the dates upon which the respective principal amounts therein specified fell due was part and parcel of the account itself as rendered and accepted by the Cherokee Nation, and as subsequently reported to the Congress by the Secretary of the Interior for an appropriation. It was included within the express promise on the part of the United States to pay to the Cherokee Nation any sum found upon such accounting to have been improperly withheld. If the account had not contained an express admission of liability upon this point, it is not too much to assume that the Cherokee Nation would not have abandoned the privilege accorded to it by the act of 1893 to resort to the Court of Claims within twelve months from the rendition of the account to have the question of its right to receive interest upon such account determined, for by the eleventh article of the Treaty of 1846 it is expressly recited that the Indians had claimed interest upon "whatever sum may be found to be due the nation," and that the question was left to the Senate as umpire to determine, first, whether interest should be paid, and, second, if so, "from what date and at what rate per annum" (R., 96).

The Senate, so acting as umpire, on September 5, 1850,

"*Resolved*, That it was the sense of the Senate that interest at the rate of five per cent. per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, (who together at that time constituted the Cherokee Nation) from the twelfth day of June, eighteen hundred and thirty-eight, until paid."

And the Congress thereafter, by numerous acts appropriating moneys to be paid to Cherokees on various accounts, confirmed and gave countenance to the Senate's award upon this point.

See Act of Sept. 30, 1850, 9 Stats., 556; Act of Feb. 27, 1851, 9 Stats., 572.

Prior to the rendition of the Slade-Bender account, the question of the propriety of allowing interest upon certain claims of the Cherokees arising out of the Treaty of 1835 and prior years had been the subject of consideration by this court and had been resolved in favor of such allowance.

U. S. *vs.* Western Cherokees, 148 U. S., 178.

In 1893, when the United States undertook to render the accounting now in question, the amount of interest claimed already exceeded the amount of the principal debt. In the negotiations which culminated in the agreement of 1891 the Cherokee Nation, as appears from the report made by the Commissioners on behalf of the United States to the President prior to the passage of the act of March 3, 1893, insisted "that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal *and interest*, will be found to be due them. They also desired to include lands as well as money, but they were induced to eliminate lands from the provision. With that eliminated the provision was agreed to as set out." It thus appears that at the time of the entering upon the agree-

ment to render the account, and at the time of the rendition itself, both the Cherokee Nation and the legislative as well as the executive branches of the United States Government fully understood that one of the main items, if not the main item, for the payment of which the Cherokee Nation was contending, was the item of interest accrued upon various principal sums, and so when the United States, rendering the account in its own way, through its own instrumentalities, deliberately and in unmistakable terms admitted its liability to pay interest upon the principal sums which were also thereby admitted to be due and payable, it would seem that in the absence of fraud or mistake, neither of which are shown to have intervened here, such admission as to interest, solemnly accepted and acted upon by the Cherokee Nation, should be treated as binding and of equal force and dignity with the admissions concerning the obligation on the principal sums themselves. The agreement to pay interest upon the principal sums found to be due was as much a part of the consideration for the sale of the Indian lands as was any other portion of the purchase price.

But learned counsel for the United States suggest that although the general liability of the United States to pay interest upon the specified sums was admitted by the account, nevertheless, as the account did not in express terms specify the rate per cent. at which such interest was payable, the Court of Claims had acted without proper foundation in ascertaining and decreeing that interest should be paid at the rate of 5 per cent.

This suggestion is, to say the least, inconsistent with the twice-made concession on the part of the same learned attorney, that the action of the Court of Claims allowing interest upon the three smaller items was proper, for the right to interest in each of such instances depends upon the findings of the account stated in words identical with those which declare interest to be payable upon the item of $1,111,284.70. It is

not true that the accountants in their report do not at any point specify the rate at which interest is to be paid. In the course of discussing the treaties of 1835 and 1846 and the various demands of the Indians founded thereon, the accountants refer to the report of Mr. Jarnigan of February 19, 1847, from the Committee on Indian Affairs, wherein it was

"*Resolved*, That in the opinion of the Senate, whatever balance of the fund of $5,000,000 stipulated to be paid to the Cherokee Nation by the treaty of 29th December, 1835, and the subsequent additions thereto may now be ascertained to be due to said Cherokee Nation, shall bear an interest at the rate of five per cent. per annum from the time found due until same be paid by the United States."

It is quite true that the accountants do report that "no action appears to have been taken upon these resolutions" (p. 18), but upon the general principles involved the accountants adopt the views of this report and at no place indicate any dissent therefrom either on the score of allowing interest at all or upon the rate per cent. mentioned.

Express reference was made in the report to the act of September 30, 1850, which rested upon the Senate resolution of September 5, 1850, *supra*, whereby there was paid to the Indians the amount deducted from said five-million-dollar fund for subsistence, together *with interest thereon at the rate of five per centum per annum from* 1838 *to date of payment*, and the accountants must be assumed to have had in mind both section 2096 of the Revised Statutes of the United States, declaring that—

"The Secretary of the Interior shall invest in a manner which shall be in his judgment most safe, and beneficial for the fund, all moneys that may be received under treaties containing stipulations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys, or of any portion, at a lower rate of interest than five per centum per annum."

and section 3659 thereof, providing that—

"All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum."

In view of these express declarations by the Congress as to the minimum rate of interest applicable to cases involving the handling of Indian funds by the United States and their officers, the omission on the part of the accountants to specify in the account itself the rate per cent. of interest to be paid would seem to be of little consequence, for that is certain which by ready reference can be made certain, and where existing statutes of the United States have expressly prohibited investments of Indian funds, even when made "in stocks of the United States," to be made at less than five per cent., the propriety of charging the United States with interest at the minimum rate where, as here, they were in duty bound to pay some interest, would seem to be beyond question.

Besides, in accepting the Slade-Bender accounting the resolution of the Cherokee National Council, passed December 1, 1894, expressly recited that it accepted the total of the principal sums due as reported to it by the United States "*with interest thereon at the rate of five per cent. per annum from the various dates of items composing this claim.*"

This resolution was at once made known to the Secretary of the Interior and a copy thereof transmitted by him to the Congress on January 7, 1895. At no time until now has the United States through any of its agents, executive, legislative, or judicial, questioned the general understanding that the principal amounts admitted by the accounting to be due should carry interest at the rate of five (5) per cent. The point was not made in the court below, and the propriety of the rate is conceded here by counsel for the Government with respect to the three uncontested items.

The right to interest in this case cannot be said to at all fall within the prohibition of section 1091 of the Revised Statutes of the United States, nor within the principles announced by this court in the case of Tillson *vs.* United States, 100 U. S., 43, but it does fall within the reasoning of this court in the case of The United States *vs.* Old Settlers, 148 U. S., 478, where it was said:

"In this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed (and) was accepted as valid and binding by the United States, * * * In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated."

That it was intended and contemplated by both parties to the convention of 1891–'93 that the United States should render a complete account of the moneys due, both principal and interest, cannot reasonably be doubted. The suggestion that because the account itself as submitted to and acted upon by the Indians did not in terms specify the interest rate to be paid upon the amounts admitted to be due, "with interest," although the public statutes of the United States and the definitive action of the Senate, which the Congress had already recognized and approved by making appropriations based thereon, had definitely specified an applicable rate, will hardly appeal to a court of justice. Here the lands for which the Indians are now seeking to compel the payment of the balance of the purchase-money have been in the possession and enjoyment of the United States or their grantees for more than twenty years. Why should not the guardian who has improperly withheld payment from its ward be required, upon principles of established equity as well as of sound law, to repay with interest added?

But it has been, and may again be, urged that the position of the Cherokee Nation in thus insisting upon the contractural force of the account stated is technical, and that therefore the position will not be regarded with favor. That argument would not be heard coming from a private party in a similar case. It is difficult to see why it should be given weight here.

There was no surprise in the result. The demands in question were as old as the treaties themselves, out of which they grew. In fact, these demands for money compensation under the treaties were substitutes reluctantly accepted for the earlier and very earnest contention that the entire treaties were the result of governmental dictation, and were, therefore, without validity. But these money demands had been clung to and urged as affording the only relief for an accomplished wrong which the Government would countenance. Throughout the negotiations for "The Outlet," leading up to the treaty of 1891–1893, these demands, principal and interest, were insisted upon. This appears from the official discussions and reports of that time (Transcript, p. 104). The agreement of the United States to render its account of these demands, for consideration or acceptance, by the Cherokee Nation is one of the two chief considerations for the sale of "The Outlet."

Nor was the result an accident. It was reached without aid on the part of the Cherokee Nation. Acceptance of the account as rendered constitutes their sole contribution to its binding force between the parties.

Throughout the United States acted upon its own methods and by its own agencies in a feeble attempt to render tardy justice to the Cherokee Nation. As was well said by the commissioners, who negotiated the agreement of 1891 on the part of the United States: "The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no

possible reason can exist why the error should not be corrected" (Transcript, p. 104). To repeat, no private party would be heard to dispute an account rendered under such conditions, and we submit that the United States should be held to the same rule.

Finally, we submit that if the account as rendered were open to present inquiry, the same conclusion would be reached. Upon the merits of the case in every aspect the judgment of the Court of Claims asserting liability on the part of the United States was correct.

The contention of the Government appears to be that the demand here in question rests entirely upon article 15 of the treaty of 1835. The argument is that the Eastern and the Western Cherokees, having received all their *per capita* payments to which they might have become entitled by the provision of said article 15, the liability of the United States to them is accordingly exhausted, and the report of Messrs. Slade and Bender lacks all foundation.

This, we submit, is neither an accurate nor a full statement of the matter. It is true that if the wording of said article 15 of the treaty of 1835 alone is to decide this case the Cherokees have been paid in full. The settlements made with the Eastern Cherokees in 1851 and the receipts at that time executed by them cover every claim to per capita distribution provided for in said section. They were even allowed for subsistence to which, strictly speaking, the Eastern Cherokees were not entitled. The settlements made with the Western Cherokees at the same time, supplemented by the allowance for subsistence made to them by the decision in the "Old Settlers" case, put them in precisely the same position in which the Eastern Cherokees were left.

The real question therefore is, Did these settlements sat-

isfy the actual obligations of the United States? We contend not, and for these reasons: The principal item in question in this case grows out of the fact that removal expenses of the Eastern Cherokees were taken out of the $5,000,000 fund to be paid for the Cherokee lands under the treaty of 1835. Had the Government the right to do this, or was the United States bound to pay this expense in addition to the purchase-money for said lands?

Article 15 of said treaty of 1835 is as follows:

"ART. 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, *removal* subsistence, and debts and claims upon the Cherokee Nation and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invented for the general national fund provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east, they shall also be paid for their improvements according to their approval value before their removal where fraud has not already been shown in their valuation."

If article 15 of the treaty of 1835 expressed the entire obligation of the United States, the Government would have support therein for its contention. But this is not the fact. As far back as the treaty of 1828 made with the Western Cherokees the United States, for a consideration, assumed to pay the removal expenses of Cherokees who might desire to go west to join their brothers. This is the language (Transcript, p. 83) of that treaty:

"The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions secured for their comfort, accommodation and

support by the way, and provisions for twelve months after their arrival at the agency," etc.

In no treaty since then has this obligation of the United States been released.

President Jackson's letter of March 16, 1835, addressed to the Eastern Cherokees, confirmed this obligation in these words (Transcript, p. 85):

"3d. For the removal at the expense of the United States, of your whole people," etc.

Again, the treaty of 1835 with the Eastern Cherokees (in which article 15 is found) confirms the obligation of the United States to pay removal expenses, both by inference and in express terms. Article 1 (Transcript, p. 86) says:

"The Cherokee Nation hereby cede * * * all lands * * * and hereby release all their claims * * * for spoliations * * * in consideration of the sum of five millions of dollars, to be expended, paid and invested in the manner stipulated and agreed upon in the following articles."

This sum was therefore the purchase-money.

Article 8 of the same treaty (Transcript, p. 86) says:

"The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there," etc.

Article 17 of the same treaty (which is not included in the transcript) says:

"All stipulations in former treaties which have not been superseded or amended by this shall continue in full force and effect."

Nowhere is there an express repeal of or release from this reiterated obligation of the United States to pay removal expenses. The Government is therefore forced to rely upon the inference to be drawn from article 15 for this result.

We submit that this article nowhere states that the United States shall be so released, or, indeed, that the Cherokees shall pay for their removal. The article merely makes provision for ascertaining how the fund for per capita distribution shall be ascertained. This method is not necessarily exhaustive of the entire fund. A large part of it is otherwise disposed of by the treaty itself. The utmost that can be said is that the several provisions are not in apparent harmony. Admitting this, will the repeated unequivocal promises on the part of the United States to pay removal expenses be construed out of its treaties and contracts because a provision for the per capita distribution of part of the fund appears to be in conflict with this obligation?

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of more extended meaning than their plain import as connected with the tenor of the treaty, they should be construed as used only in the latter sense. * * * How the words of a treaty were understood by this unlettered people, rather than their critical meaning should form the rule of construction."

Worcester *vs.* Georgia, 6 Peters, 515, 582.

This is the rule to be commonly accepted. It is accentuated by another rule that language shall be construed most strongly against the party who prepared the instrument. Both rules find peculiar application in a case in which it is admitted that the treaty in question was prepared by an adroit representative of the Government, and that in fact the document is called a treaty only by courtesy, because the consent of the Cherokees was never given, and the terms of the so-called treaty, so far as the removal of the Indians is concerned, were finally carried out by military force.

We submit that there is no circumstance in this case, which goes to show that the Cherokees at any time understood or suspected that the United States had been released

from its obligation to pay for their removal expenses. That being so, they were entitled to insist upon this obligation, which they then did do in express terms, as appears from the supplementary articles of the treaty of 1835, upon which they were finally forced to rely.

In the Eastern Cherokee case, 117 U. S., page 301, the court says: "They (the United States) also agreed to remove the Indians to their new home" (referring to this same treaty).

The attitude of the Cherokees at the time and since then bears out this contention, and the course of the Government in making an appropriation of $600,000 to include removal expenses by the supplementary treaty of 1836 was a concession on its part of the correctness of their position (Transcript, p. 87).

Subsequent to this nothing occurred to affect this question The purpose of the treaty of 1846 was merely to unite the branches of Cherokee people, to adjust differences, and to settle the Government's liability for per capita distributions. Articles 4 and 9 of the treaty of 1846 (Transcript, pp. 94–'6) provide for the settlement of these per capita claims of the Western and Eastern Cherokees respectively. Their receipts (Transcript, pp. 99 and 100) express the same purpose. When all has been said and done, the payments made under the treaty of 1846 and the receipts given for these payments do not accomplish more than to exhaust the Government's liability to make per capita payments under article 15 of the treaty of 1835.

The remonstrances of the Cherokees (Transcript, pp. 98–'9), however, reached beyond these payments and consistently enough asserted the real claim that the Government had no right to take removal expenses out of the treaty fund, and that this obligation of the Government had nowhere been released.

This claim was thereafter repeatedly recognized by Gov-

ernment officials, and it forms the foundation for the account which was rendered by the United States to the Cherokee Nation under the agreement of 1891–1893.

The Slade and Bender account was made after the final decision by the Supreme Court of the "Old Settlers" case. The question, therefore, is, what was the foundation of the account? The court had decided that per capita distributions to Eastern as well as Western Cherokees, claiming under the treaties of 1835 and 1846, must be charged with removal expenses (Court of Claims, Rep., vol. 27, p. 45–'6). True the claims of the Western Cherokees alone were involved in the decision. But the principle in both instances is the same, and the language of the court covers both branches of the Cherokees. Again the language of the treaties of 1835 and 1846 is equally clear in its references to both cases; so that the decision of the court made in one case, must necessarily conclude the other.

The court did not say that the fund provided by the treaty of 1835 must be charged with removal expenses. If the court had so said, we should still maintain that the account is, for the reasons hereinabove stated, binding upon all parties. But the court made no such decision. The court has, however, distinctly defined the rights of all per capita distributees of either branch, and according to that decision the express provisions of both treaties upon that subject have been satisfied. What, then, becomes of that part of the treaty fund which according to the finding of the award has been improperly charged with these removal expenses? In the nature of things it goes where all other property secured by the treaty of 1835 has gone that had not been specifically otherwise applied or directed. It goes where the lands had gone, where the school fund had gone, where the national fund had gone. It goes where the undisputed items in this very suit, regardless of their origin or their time, go, and for the same reasons. In other words,

the fund which is secured by the Slade and Bender account does not fall within the provisions for per capita distribution under either treaty, and that fund must therefore go to the general funds of the nation or must be distributed among all its people in such manner as may be here determined. This fund is clearly such property as was contemplated by the act of union between the Eastern and Western Cherokees (Transcript, p. 91).

The Slade and Bender account need not, and we suggest does not, rest upon the letter of the treaties of 1835 and 1846. It builds upon equity, promises equity, with due regard to the principles of broad justice and sound policy. The account, we submit, does not depend solely upon the express provisions of the treaties of 1835 and 1846. It rests upon the obligation to pay removal expenses, which was expressly assumed by the Government under the treaty of 1828, which has never been abrogated. It recognizes the promises of President Jackson made to the Cherokees prior to 1835, which were never withdrawn. It respects the explicit promise in article 8 of the treaty of 1835 itself. It considers the repeated authoritative representations made to the Cherokees by agents and officers of the Government, which have never been repudiated. It recognizes, as the Senate felt bound to concede immediately after the treaties were announced, that they, the treaties, did not really express the actual understandings with the Indians. The account recognizes the truth of the Cherokees' protests and remonstrances made prior to and at the time of the treaties and continued for half a century afterwards, which constituted in 1893 the basis of the demand for an accounting embodied in the treaty of that year. The award stands upon the moral and political obligations of the Government, made in innumerable ways in the course of its dealings with the Cherokees; obligations, we may add, which the Cherokees had better reason to understand and to rely upon

than they had upon so-called treaties to which they are admitted not to have been actual parties at the time of their making. To repeat, this fund so established should go where other considerations growing out of these treaties of 1835 and 1846 have gone, and in the same manner. Happily this fund will be relieved from the difficulties and contentions of forced treaties and inconsistent compromises; and as to it, at least, the Government is now in a position justly to interpret the treaty of 1835, as though all Cherokee property had at that time belonged to one nation, and as though all Cherokees had been willing parties to that treaty, of which few of them, indeed, had so much as notice, although it was destined to settle their property rights and their fate as a people.

This, we submit, leads to a just decision of this case in keeping with the enlightened policy that has prevailed in other cases of a similar character. The account "furnished the nearest approximation to the justice and right of the case, that after this lapse of time it is practicable for a judicial tribunal to reach."

Choctaw Nation *vs.* United States, 119 U. S., p. 39.

Moreover, whatever the claim to have the United States pay removal expenses, it was merged in the account rendered to the Cherokee Nation, and by it accepted. The claim, though disputed, embodied an existing legal liability, which was merged in the account rendered to the Cherokee Nation just as an open account would be merged in a promissory note given in settlement of it. If it only constituted a *bona fide* demand, to which the Government may have had a legal defense, nevertheless the United States must be held to have waived its right to make such defense by the act of 1893, and that *bona fide* demand furnishes the foundation for the liability, which has now been given definite and final form in an account rendered by the United States and accepted by the Cherokee Nation.

On behalf of the Government it is contended that the agreement of the United States in the act of 1893 was merely to account for and pay "moneys *due* the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1828, 1835," etc.; that whatever rights the Cherokee Nation may have had under the treaties enumerated had been satisfied and extinguished by subsequent accountings, settlements, and litigation between the parties, and hence that there were, as a matter of law, no "moneys due the Cherokee Nation" under any of said treaties at the time this agreement was made. From this it is argued that the accounting had under that agreement, in so far as it allowed the Cherokee Nation items for which the Government was under no pre-existing absolute legal liability, was *ultra vires* and void.

This argument in its last analysis amounts to this: That the treaty of 1893 added nothing to the existing rights of the Indians; it gave them merely the privilege of having a statement rendered showing the amounts theretofore paid to them without regard to how just or unjust had been the previous settlements with them.

It cannot be denied that prior to the treaty of 1893 there had been accountings, settlements, and litigations between the United States and the two branches of the Cherokees, which the Government insisted determined conclusively the question of its legal liability under the treaties enumerated. Nor can it be denied that the Cherokee Nation contended that the previous accountings and settlements were improper and unjust, and as a condition precedent to its agreement to cede "the Outlet," it demanded that the questions (which the Government claimed had been) concluded thereby should be reopened and reconsidered. (Transcript, page 103.)

In recognition of this demand the act of 1893 expressly provided for the rendering of a new account to the Cherokee Nation of moneys "promised but withheld by the United States from the Cherokee Nation under any of said

treaties" and granted to the Nation the right, if it so desired, to have the courts pass upon the question whether any amounts of money were "improperly or unjustly or illegally adjusted in said accounting."

Under the rule of construction announced in Worcester *vs.* Georgia, *ubi supra*, can it be contended that the agreement of 1891–1893 intended to leave the Indians concluded by prior settlements, the claimed impropriety and injustice of which had caused this very stipulation to be inserted therein. Can it be contended that the only thing which the Indians bought by this special condition for the cession of their lands was the right to have the Government recall the accounts which had already been made up without any re-examination of the charges and credits appearing therein?

If this was the understanding, then all reference to the treaties of 1835–'6 and 1846 was without legitimate purpose. Obviously there were few claims which the Cherokee Nation could urge in 1893 as growing out of those treaties. Among these was the claim for moneys deducted for removal expenses in 1838 which is here in question. Against the disallowance of this claim the Cherokee Nation, as such, had protested at the time when the individual Eastern and Western Cherokees gave receipts in full as individuals for the amounts which Congress had appropriated for them in satisfaction of articles 9 and 4 of the treaty of 1846, respectively. This claim had never been abandoned, and when the promise was made by the United States in 1893 to render an account of moneys due the Cherokee Nation under the treaty of 1835, that item alone occupied conspicuous position in the minds of both parties. The United States must, therefore, here take the position either that it was its purpose in 1893 to mislead the Cherokee Nation by an unfounded expectation, or that it was its purpose to reconsider and restate this account. For what other purpose could the treaty of 1835 have been referred to? The question furnishes its own answer, and the Cherokee Nation, by the Slade and Bender accounting,

received no more than it had fair reason to expect. Had the account omitted this item, the Cherokee Nation might still have resorted to the Court of Claims to establish its contentions thereabouts. When the item was allowed in the Government's own account and credit thereby given to the nation therefor, the Cherokee Nation's oft-repeated contention was made good, and had the Congress made appropriation to cover the sum of money so found to have been withheld, as it had agreed to do, the oft-repeated demand of the Cherokee Nation in this regard would have been fully met.

In this connection the Government lays especial stress upon the decision of this court in the Old Settlers' case (148 U. S., 478), as concluding the question of the legal liability of the United States under the treaty of 1835.

For the sake of argument, let the full effect claimed by the Government be given to that decision, and let it be assumed that it was there decided that the Government was under no obligation to pay what is now and was thereafter claimed to be due on account of removal expenses, still that decision can have no effect upon the present case, either under the doctrine of *stare decisis* or the doctrine of *res adjudicata*.

This suit is for the enforcement of the express promise of the United States contained in subdivision four of the second article of the agreement of December 19, 1891, as ratified March 3, 1893. That promise was made after the decision referred to had been rendered. It was a promise to pay upon certain conditions which, it is admitted, have been strictly fulfilled. It rested upon an independent valuable consideration, of which the United States has now had the enjoyment for many years, and which, confessedly, cannot now be restored to the nation which parted with it. Can the validity or effect of this promise be in anywise affected by the fact that before the promise was made, in a collateral proceeding to which this nation was not a party, it had

been decided that as a matter of law the United States was under no existing obligation to pay a part of the amount which it subsequently admitted to be due and expressly promised to pay?

In its legal aspect there is no difference between a promise to pay a sum to be ascertained in a specified manner and an absolute promise to pay a sum certain. As soon as the sum is ascertained the obligation is as complete and the liability as fixed as if the amount had originally been fixed by the terms of the promise. If then, as part of the purchase price of the Cherokee Outlet the United States had agreed to pay the nation the amount due the nation under previous treaties, "which amount is hereby fixed at $1,133,841.98, with interest, etc.," instead of providing for the subsequent fixing of the amount, could it have been contended that the effect of that promise or the extent of that obligation would be in the slightest degree modified by the fact that, prior to the making of the agreement, it had been decided, in a collateral proceeding that, with respect to a portion of the amount so fixed, the United States was under no existing legal obligation? Obviously not, we submit, and yet in legal effect this is the defense now presented.

In short, the obligation here sought to be enforced rests upon an express contract made after the decision in question was rendered, based upon an independent consideration which passed after that decision had become final, a contract, the obligation and binding effect of which depends upon that consideration and not upon the question as to whether there was or was not a preëxisting liability to pay the sums agreed to be paid. As is concisely said by Chief Justice Nott in his opinion below: "It is manifest that the agreement here intended something more than that the Cherokees might come into court to be immediately turned out under previous decisions" (Transcript, page 50).

But if it be true that the United States may have had a perfect legal defense to any claim on the part of the Indians

for moneys due under the treaties mentioned by reason of previous accountings and prior adjudications it is still clear that Congress had the power in its discretion to waive any such defense.

New York Indians *vs.* United States, 170 U. S., 1.

And it was this very waiver by the United States of its technical defenses and its consent to reopen and readjust the questions theretofore technically concluded, which the Cherokee Nation purchased from the United States and paid for in and by the cession of its lands.

If the present contention of the Government be correct the obligations of the Government to the Cherokee Nation remained exactly the same after the act of 1893 as they were before and the promise of the Government to restate the then existing accounts which the Cherokee Nation demanded and received as a condition precedent to parting with its lands, was but the shadow of an irridescent dream. But as was said by the court below (Transcript, p. 50):

"Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them so to believe) that all of their claims and rights and equities were to be reopened and re-examined *de novo*; and that upon the faith of that belief they made the cession of "The Outlet."

II.

The claim of the Eastern Cherokees that the fund belongs exclusively to them has no foundation in the legislation of 1893 under which the account was rendered, or in the earlier treaties of 1828, 1835 and 1846 under which the demand arose, nor can it be predicated upon the acts of 1902 or 1903 conferring jurisdiction upon the Court of Claims to hear and determine claims by the Cherokee tribe or any band therof, against the United States.

Assuming the propriety of the judgment of the Court of Claims as against the United States, the question arises as to whether that judgment was properly rendered in favor of the Cherokee Nation rather than in favor of the Eastern Cherokees.

With respect to the three smaller items, as has been said heretofore, there is no dispute that they were properly adjudged in favor of the Cherokee Nation.

But with respect to the large item of $1,111,284.70, the Eastern Cherokees contend that the judgment should have been in their favor by name, and that so much of the judgment of the trial court as favored the Cherokee Nation by name and the so-called Western Cherokees by specification is erroneous and should be reversed.

The differing views on this subject seem to present themselves most readily for discussion under the following heads:

(A.) The agreement of 1891–1893, which provided for the rendition of an account of all moneys promised but with-

held by the United States under various treaties and upon which alone the Slade-Bender accounting depends for its binding effect fixed an obligation upon the United States to pay the amount found to be due to the Cherokee Nation.

(B.) Apart from the agreement of 1891-1893, and the account rendered thereunder and the designation by the United States of the beneficiary, in case anything was found to be due upon the accounting, the history of this claim shows that this fund should not be adjudged to belong to the Eastern Cherokees alone, to the exclusion of all other members of the Cherokee Nation.

A.

The agreement of 1891, as ratified by the act of 1893, established beyond peradventure the beneficiary, if upon the accounting to be had thereunder anything should be found to be due from the United States.

The position of the Cherokee Nation is that the recovery for the several funds named in the report of Slade and Bender must be had in the name of the Cherokee Nation. The agreement of 1891, ratified March 3, 1893, was made by the United States on the one part and the Cherokee Nation, acting through properly appointed commissioners, on the other part. The consideration which passed from the latter to the former constituted property which belonged to all the members of the nation and was ceded to the United States by the vote of the Cherokee Nation as such.

The language of the agreement is "that the United States shall, without delay, render the *Cherokee Nation*, through any agent appointed by the authority of the *national* council, a complete account of lands and moneys due the *Cherokee Nation* under any of the treaties * * * or any laws passed by the Congress of the United States * * *

and upon such accounting, should the *Cherokee Nation* conclude and determine that such accounting is incorrect or unjust, then the *Cherokee Nation* shall have the right * * * to enter suit against the United States * * and if it shall be found, upon such accounting, that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the *Cherokee Nation* upon the order of its *national* council," etc.

The appropriation of $5,000 was made March 3, 1893 "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the *Cherokee Nation* of moneys due said *nation*."

Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered to the Secretary of the Interior the accounting provided for, and said accounting, after thorough examination by the proper executive officials on the part of the United States, was transmitted through the specified channel to the CHEROKEE NATION, and having been accepted by the CHEROKEE NATION without demur and the Secretary of the Interior having been notified to that effect, said Secretary of the Interior in 1895 transmitted to the Congress "a complete account of moneys due the *Cherokee Nation* under any of the treaties" * * * "and any laws" * * * "prepared in accordance with the provisions of the said act of March 3d, 1893, together with a certified copy of an act of the Cherokee national council accepting said accounting."

These several steps would seem to close the question of liability in this case. Does a reading of the entire transaction raise a doubt as to the sole right of the Cherokee Nation to recover? We submit that the same reasoning which makes the report conclusive upon the United States makes it so

upon all parties claimant here. The Cherokee Nation made the demand for the payment of lands and moneys due it; it secured the agreement; it furnished the consideration; to it the accounting is rendered of moneys due to it; and by it that accounting is accepted. More than that; in the acceptance all the items (some of which are admitted even now by all contestants to be due to the Cherokee Nation as such) are lumped, and the grand total of $1,133,841.98 appearing therein is accepted by the national council as being the amount due to the Cherokee Nation from the United States as a common result of the entire accounting. Plain and unequivocal as was the finding, the report and this acceptance, there was no word of remonstrance or exception of any sort from any source, although it is admitted that the Eastern Cherokees, so called, were in a decided majority in the nation, and were at all times during the progress of these proceedings in control of the national council of the Cherokee Nation. Certainly it will not be argued that undue haste was shown at any stage; after each step many months intervened to give fullest opportunity for reflection and action.

Even if the Eastern Cherokees should be permitted to assert special interest to the benefits of the award, they must come in under the Cherokee Nation and not in opposition to it.

If the Eastern Cherokees were here to assert a distinct claim, based upon treaties and acts of Congress apart from the account rendered, such a position would raise a different question and would call for different consideration. But that position the Eastern Cherokees have abandoned. They admit that the agreement of 1891 and the account rendered thereunder is the ground of the recovery; they must admit, as a necessary consequence, that the judgment must go to the party recognized and named in the agreement for the accounting and to whom the promise to pay what might be found to be due was made. Our position, therefore, is that

the Cherokee Nation stands upon this account and denies the right of any other party to pre-empt its name for the purpose of recovering upon that account.

Even as interpleaders, properly speaking, the Eastern Cherokees would be confronted by the difficulty that the United States owes a contract obligation to the Cherokee Nation. Under a well-recognized rule of law, the United States could not, by forcing another party to interplead, be absolved from an obligation which it owed distinctly to one party as a result of contract. The payment must be made to the Cherokee Nation as the contract reads; and if the fund so paid is to be pursued afterwards, it must be done by separate proceedings against the party who has received that fund in satisfaction of its recognized demand.

Furthermore, the Cherokee Nation is bound to admit that all rights and claims which it may have had prior to 1891, and which are referred to in the agreement of that year, are now merged in the account rendered in pursuance of that agreement. The United States was to make a statement of all obligations for acceptance or rejection. In case of acceptance, the release of all claims not allowed was part of the consideration to the United States for the agreement of 1891 and its ratification by the Congress in 1893. The Cherokee Nation having accepted the account cannot now be heard to renew demands not thereby allowed, nor, indeed, discuss the foundation of those that were allowed, for any purpose other than to show the force and the reason of the account itself. Nor can the Eastern Cherokees, in any event, be permitted to assume the name and style of the whole nation, to assert their claim to the proceeds of the account on the one hand, and, on the other, to appear as a separate band to assert in their own name, independently of the account, the claims which have been either allowed or disallowed thereby. This would amount to affirming and disaffirming the account in one breath. Such a course would confess that the account, if it shall stand, belongs, at

least in the first instance, to the Cherokee Nation, to whom it was rendered by the consent of all parties.

It is only in connection with their contention that as against all other members of the Cherokee Nation they are entitled *equitably* to receive the entire proceeds of the recovery that they seek to go behind the accounting itself and to find in the provisions of the specified treaties an exclusive right in themselves to enjoy its benefit. The supposed exclusive right of the Eastern Cherokees so asserted in these proceedings grows out of and is thought to find support in the provisions of the act of March 3, 1903 (32 Stats., 982, 996), declaring how section 68 of the act of July 1, 1902, which conferred jurisdiction upon the Court of Claims and this court to hear and adjudge the claims of the Cherokee tribe or any band thereof against the United States, shall be construed. The provision of the act of 1903 in question, in addition to conferring upon the "Eastern Cherokees, so called" the status of a band or bands "for all purposes of said section" and directing the manner in which such band or bands should assert their claims—which action was possibly within the legislative competency of the Congress, goes further and purports to amplify the jurisdiction already conferred upon the Court of Claims under said section 68 by authorizing said court "to determine as between the different claimants, to whom the judgment so rendered equitably belongs either wholly or in part." That this amplification of the jurisdictional act was within the legislative competency of the Congress is not by any means clear.

The act of July 1, 1902, formed one element, and that, perhaps, the most important one, of an elaborate agreement entered into by and between the United States and the Cherokee Nation for the surrender by the latter of its tribal government and communal relations, and the reduction of its common property to cash for the purposes of civic and *per capita* distribution under the beneficent supervision of

the United States, acting through the Secretary of the Interior and his subordinates.

By that act the nation and its citizen-allottees surrendered their right of common property; their right to collect their own revenues; their right to distribute their own funds in their own way; their right to determine in their own manner and according to the dictates of their own consciences what names should appear upon their rolls of citizenship; how their school funds should be used and their children should be educated; how and by whom their public roads should be built and their towns established and governed; and how the proceeds of their common property should be distributed. All this they surrendered in consideration, among other things, of the bestowal upon them of the blessings of citizenship and the right under said section 68, on the part of the nation or any band thereof, to institute suit in the Court of Claims against the United States, to secure a judicial determination of the merits of any claim "arising under treaty stipulations which said nation or band might have against the United States."

Said section 68 provided in clear terms for the manner in which either the tribe or "any band" thereof should proceed in the institution, prosecution, or defense of any suit which might be instituted thereunder, it being particularly provided that in such connection any band should act "through a committee recognized by the Secretary of the Interior." By subsequent sections of the act in question provision was made for the ratification of said act "by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation" in the manner therein specified. The act in question was accepted and ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner and in the form proposed by the Congress. It does not appear that the mandatory provisions of the act of 1903, which purported to alter the provisions of

said section 68 of the act of 1901, in so far as the method o procedure by "bands" and of the disposition of the proceeds of any recovery which might be made as against the United States, was at any time submitted to the Cherokee Nation for its consideration and ratification. We submit with great deference that in view of the agreement expressed by the act of July 1, 1903, which had been already partially performed, the consideration for which on the part of the nation had largely passed and has not been offered back, it was not competent for the United States to alter or amend said agreement of its own volition in any particular, certainly not in any substantial particular—such, for instance, as to take away from the nation as such, a legal right to recover in its own name an amount already stated to be due to it upon an account rendered to it by the United States and to bestow the right to recover such amount upon subordinate bands or individual members of said nation.

New York Indians vs. United States, 170 U. S. 1,
14 Diamond Rings Case, 183 U. S., 183.

But if the law was otherwise it could not be claimed that there is a word in the declaratory provision of the act of 1903 to change the legal title to the amounts due under the account stated. As to it the Court must decide in favor of the rightful claimant; that is, for the party to whom the account was rendered. We submit that as matter of law no other conclusion is possible.

What more could the court do under the provision that it shall determine among the different claimants to whom the judgment so rendered *equitably* belongs? After all, equity follows the law. The court will not indulge in mere sentiment; will not say that the award ought to have been different, or that the court might have arrived at a different conclusion from Slade and Bender. There is no foundation here for the assertion of an equitable claim to defeat a legal right founded upon the account rendered.

Such an account stated could only be assailed upon the ground of fraud or mistake, and neither the United States nor the Eastern Cherokees attack it upon either of those grounds. The case of Tillson *vs.* United States, 100 U. S., 43, would seem to bear pertinently upon this point.

In the "Old Settlers Case" 148 U. S. 469, the court says:

"The settlement of a controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto, and the determination of what sum, if any, may be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties, or holding them inoperative on the ground alleged.

"The Court of Claims was indeed to have "unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of the said Indians, may be fully considered and determined."

"But this did not mean that either party was entitled to have or receive, by virtue of the act, anything more than each was entitled to under existing stipulations, or to bring supposed moral obligations into play for the disposal of the case. The inquiry was not to be technically limited by rules of procedure, or restrained by the restrictions between law and equity."

Even if this Court should incline to the view that the Eastern Cherokees had an equitable claim to the funds recovered it would have no legal authority to destroy the right and the title thereto which the whole nation purchased by the cession of its national lands.

If the Eastern Cherokees could show that the account had been rendered to them or had been stated in their favor that might alter the case. But their attempt now to assume the name "Cherokee Nation" cannot avail them.

Upon this point the Congress has left nothing open for judicial ascertainment for the very first section of the act of July 1, 1902, under which this court acquired jurisdiction to determine this case, declares that the words "nation" and

"tribe" as used in said act shall each be held to refer to "the Cherokee Nation or tribe of Indians in Indian Territory." While "Cherokee Nation" or "Cherokee Tribe" clearly includes the "Eastern Cherokees so called," it is equally true that the "Eastern Cherokees so called" do not alone compose the "Cherokee Nation" or "tribe."

The membership of the nation is not made up solely of Eastern and Western Cherokees. By the treaty of 1866, for illustration, members of other tribes and races were admitted into full membership. By such admission the members acquired a full interest in the nation's property.

The agreement of 1891-1893 and the account rendered was intended as a settlement of all disputes between the United States, the Cherokee Nation, and all individual Cherokees, and was in itself a designation by the United States of the beneficiary to whom the fund should be paid.

If in the history of this claim there should be found any real basis in fact for the exclusive claim of the "Eastern Cherokees so called," that would not compel the reversal of the judgment under review. Assuming for argument's sake that historically the claim arose out of a transaction between the United States and the Eastern Cherokees, and involved moneys improperly withheld from the latter in 1838 by the former, nevertheless by the Act of Union of July 12, 1839 the Eastern and Western branches of the Cherokee Nation had become reunited at least in name; and for the purpose of making that Union effective in fact and spirit, as well as in name, the treaty of 1846 had been entered into, by which the United States undertook and seemingly endeavored to adjust all differences between itself and both of the factions in the nation. Under the provisions of that treaty the United States paid to the Western and Eastern Cherokees an ascertained sum in liquidation of their respective claims on account of *per capita* dis-

tribution. Such sums were received and receipted for by each faction as in full settlement of their respective demands, and it is significant in this connection that while both the Cherokee Nation and the Western Cherokees protested against the impending settlements on the ground that proper allowance had not been made therein for the moneys deducted in 1838 from the so-called "Treaty fund," on account of removal expenses, the "Eastern Cherokees" as such did not enter any protest thereabouts. From 1846 to 1891 the claim against the United States on that account was urged in the name of the Cherokee Nation; and in providing for a statement of moneys due the Cherokee Nation, and the payment of the amount so found to be due as provided by the agreement of 1891-1893 the United States but exercised its well understood power of control over and disposition of the properties of their Indian wards. Within the limits of good faith the United States had the undoubted right and power to dictate the manner and terms of the settlement of this long pending and vexatious claim which the Cherokee Nation as a political body was urging against it. The United States having the power to dictate terms elected to exercise it, and recognized the Cherokee Nation as the proper body with which to adjust this difference, and the method of settlement proposed by the United States was agreed to by the Cherokee Nation, of which the Eastern Cherokees formed by far the greater part, without objection or dissent from them. Having through their tribal representatives accepted the method of settlement proposed by the United States, and the Nation itself having altered its position with respect to the ceded lands as the result of such agreement, it is now too late for the Eastern Cherokees to insist that the agreed method of settlement is violative of their individual rights. They are estopped from so doing by their acquiescence in the manner of settlement heretofore agreed to by them as well as by the exercise, on the part of the United States, of

its power not only to adjust disputes between factions of Indian tribes, but in the case of need to abrogate treaties themselves in furtherance of governmental policies.

Even if there was doubt either as to the propriety of the legislation of 1893 affirming the agreement of 1891, that doubt would not justify this court in declaring such legislation invalid; for the legislative action which is now complained of by the Eastern Cherokees was taken by the Congress by virtue of its political and administrative power, and the exercise of such power and the manner of such exercise are not subjects for review by the courts. They are cognizable by the legislative and executive branches of the government.

Cherokee Nation vs. Hitchcock, 187 U. S., 294, 308.

This case does not present any question as to the taking of property, but involves merely the administrative settlement of disputed claims against the United States which were incapable of being enforced save in the manner and by the methods assented to by the latter. No more was done with respect to this item of $1,111,284.70 than was done with respect to the first item of the same account. That item reads:

"Under the treaty of 1819:

Value of three tracts of land containing 1700 acres at $1.25 per acre, to be added to the principal of the school fund. $2,125.00

With interest from February 27, 1819, to date of payment."

By the treaty of 1819 the Cherokee Nation ceded certain lands in the east to the United States, in place of lands which the Cherokees had ceded by the treaty of 1817, but had not surrendered. The United States also agreed to survey and to sell certain other lands for the benefit of the Cherokees. The United States having failed in this, the account corrects

the omission, and gives the amount to the Cherokee Nation. That conclusion is not now disputed by any one.

In both instances in the language of the Choctaw case, 119 U. S., p. 309, the result "furnishes the nearest approximation to the justice and right of the case that after this lapse of time it was practicable for a judicial tribunal to reach."

B

But in no event have the Eastern Cherokees an exclusive right to the fund in question.

If the judgment in favor of the Cherokee Nation is affirmed, the consistent conclusion would be that it belongs to those who are members of the Cherokee Nation. Such would be the rule in the case of any other judicial decision. Furthermore, this was the plain intention of the agreement of 1891-'3, which says in terms that, "the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its National Council" (Tr., p. 104).

The membership of the Cherokee Nation is not made up solely of Eastern and Western Cherokees. By the Treaty of 1866, for illustration, members of other tribes were admitted into full membership. By such admission, upon due consideration moving from them, they acquired an interest in the nation's property, including the very "outlet" which formed the consideration of the agreement of 1891-'3. A judgment in favor of the Cherokee Nation must therefore affirm a right in each and every member of the nation, in the proceeds of that judgment, unless it be held further, that in making the agreement of 1891-3 the nation was a mere trustee for particular members, or indeed, among others, for some Cherokees who have long ceased to be members.

If the first position is sustained, all uncertainty is at once removed. If, on the other hand, the second position is accepted, we respectfully submit that the claim of the

Eastern Cherokees to an exclusive right to the fund is without foundation for the reasons which have been heretofore discussed, and for the further reason that even historically considered, such an exclusive right in the Eastern Cherokees can not be maintained.

The origin of the claim considered, with respect to the contention between the Eastern and Western Cherokees.

It will not be denied that if considerations of justice and a due regard for the government's essential policy had at all times prevailed, there would be no room now for this branch of the controversy. It would hardly be seriously urged that any Cherokee who is now a member of the united Cherokee Nation, is not interested in a fund, which was realized by the sale or concession of Cherokee lands.

However the result may have been reached, it is now the accepted theory that all Cherokees (Western and emigrant), retained an interest in the Eastern land until sold, and secured an interest in the western lands, as acquired. It is immaterial to this discussion, whether in point of fact this policy obtained from the time of the Treaty of 1817, through the period embraced in the Treaties of 1828, 1835 and 1846; or, whether that policy was only accepted with retroactive force at the time when the Treaty of 1846 was entered into between the United States, the Eastern Cherokees and the Western Cherokees. Be it by original intention, when the first Cherokees removed in 1817, or by subsequent consent of both Cherokee factions, expressed in their Act of Union in 1839, or in their treaty with the United States in 1846, in effect the interest of all members of both factions, in all lands, east and west, and in the proceeds thereof, at least, as early as the last mentioned date became absolutely fixed and recognized.

If this statement is correct (and the Treaty of 1846, and the language of the courts in the "Old Settlers" case seem

to dispose of all question upon this point), then it follows that when the United States agreed to pay the Cherokees for the lands in the east, the fund so realized belonged to all Cherokees east and west, just as the proceeds of any other communal property would belong to them all.

The $5,000,000 treaty fund, after satisfying specific provisions of the treaty for the whole nation, and after paying for the individual improvements which are specifically provided for, should have been, and according to the interpretation which the Treaty of 1835 now receives, we submit, must be distributed to all Cherokees who owned the lands which formed the consideration for that fund; that is, the Western and the emigrant Cherokees, and others who have become constituent members of the Cherokee Nation.

The contention of the Eastern Cherokees for an exclusive right to the fund is at war with the accepted interpretation of the Treaty of 1835.

The position of the Eastern Cherokees seems to be, to assert their right to a proportion of the lands in Arkansas, and afterwards in the Indian Territory; but, at the same time, to insist that the United States had a right to stipulate under article 15 of the Treaty of 1835, that the balance arrived at as there provided, shall be distributed *per capita* among the Eastern Cherokees alone. The answer to this position may be framed upon either one of the two theories. If the treaty fund of 1835 belonged exclusively to the Eastern Cherokees, then the Western Cherokees were the exclusive owners of the lands in the Indian Territory; and if this be so, then the taking of the larger portion of these lands for the Eastern Cherokees, by direction of the government, resulted, by operation of law, in raising a corresponding interest in the treaty fund for the Western Cherokees. This seems to be the theory of the Treaty of 1846, which certainly has found acceptance by very high authority.

If, on the other hand, the other theory obtains, that neither faction of the Cherokees had exclusive ownership, or right of disposition of the lands east or west, then it must follow that the United States were not right in agreeing to give the balance of the treaty fund to the Eastern Cherokees *per capita* according to article 15 of the Treaty of 1835. Either theory, we submit, disposes of the exclusive right of the Eastern Cherokees as of the time when the treaty was made.

To repeat, therefore, as a matter of right the demand of the Eastern Cherokees to the balance of the treaty fund should not have been, and should not now be granted. In consenting to article 15 of the Treaty of 1835, the United States clearly undertook to dispose of an interest in lands which, in part, must be held to have belonged to the Western Cherokees.

This position was clearly admitted to be the right one by the Treaty of 1846. The United States recognized that the Western Cherokees were interested even in the *per capita* payment provided for by article 15 of the Treaty of 1835; and this notwithstanding the questionable language of that article. The Western Cherokees were accordingly paid their proper proportion of these *per capita* payments, upon the theory that they were in all respects interested in the lands that had been ceded by the Treaty of 1835. Upon this subject the language of the Court of Claims in the "Old Settlers" case is:

"By the terms of this arrangement the Eastern Cherokees consented to their sharing in the purchase money so far as it was still held by the United States in the form of trusts and annuities; and the United States agreed that so far as it had been paid away to individual Indians and could not be restored, they should pay it over again, and thus make good to the Western Cherokees their rightful proportion of the fund. * * *

"It is proper to say here that this was not the form in which the treaty stated the transaction. The document re-

cites the position asserted by the United States, that the Western Cherokees *'had no exclusive title'* to the territory west of the Mississippi, *'which became the common property of the whole Cherokee Nation by the operation of the Treaty of 1828;'* that, however, the Cherokees then west of the Mississippi, *'by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi, which interest should have been provided for in the Treaty of 1835, but which was not;'* and that they, the Western Cherokees, retain *'a common interest in the general funds of the nation,'* and *'have an equitable claim upon the United States for the value of that interest, whatever it may be.'"*

Old Settler's Case, Vol. 27, Court of Claims, p. 37.

In accordance with this view, payments were afterwards in 1851, made to both Eastern and Western Cherokees. True, mathematical equality was not secured. But equality of right and interest was established; and the payments actually made, realized that equality as far as conditions made such a result practicable at that time.

In making the payments in 1851, the Eastern Cherokees were not charged for subsistence, and a credit covering the same item was afterwards allowed the Western Cherokees in the "Old Settler's" case. The Eastern Cherokees were charged with the cost of their own removal. The Western Cherokees were charged with removal expenses, but in effect this charge was wiped out by a corresponding credit which was right and consistent, because in 1817, and again in 1828, the Western Cherokees had borne the cost of their own removal.

To all intents and purposes the two factions were dealt with upon precisely the same principle, as though the Treaty of 1835 in all its provisions (including article 15) had been made with and for the benefit of the united nation.

But article 15 of the treaty does not govern this fund, because the fund does not owe its origin to that article.

For argument's sake we have discussed the claim of the Eastern Cherokees as though the item in question had arisen under and must now be governed by said article 15, and we have endeavored to show that even then their contention must fail. We now submit that the premises themselves are false.

The Eastern Cherokees rely upon article 15 of the Treaty of 1835 for the order of distribution. But when it comes to establish the fund to be distributed, they are themselves at once driven beyond this article. They seek their claim's foundation in articles 1 and 8 of the same treaty and in the obligations of the Treaty of 1828 and the intervening promises made by accredited representatives of the Government. The paramount question here, however, is, not as to the order for distribution, but as to the creation of the fund. The form of the judgment must of necessity be governed by the title to the fund, and the title must, in turn, depend upon the creation and the growth of the fund itself. Counsel for the Eastern Cherokees affirm article 15 to secure the order, and deny it to secure the fund. For it must be remembered that the very language of article 15, which provides for *per capita* distribution, also stipulates for the *deduction* of removal expenses. To press one aspect is to insist upon the other. The provisions of article 15 must stand or fall together. The article is destroyed by its own inconsistencies. To look elsewhere for the reason of the fund, is to give that fund a new character, and, therefore, a different title.

It is undeniable that there is a conflict in the Treaty of 1835 upon the subject of the Government's obligation to pay removal expenses, and that the present controversy find its source in this conflict. Article 1 of the Treaty of 1835 promises $5,000,000 purchase money; article 8 of

the same treaty distinctly provides that the Government shall remove the Cherokees, and article 15 contemplates that this expense shall be deducted from a surplus to be distributed *per capita*. The first provision is imperative, and is enforced by equally strong promises in the Treaty of 1828; the second is inferential, making provision for a contingency which, as events proved, could never arise.

But it is significant that so soon as the United States assumed to pay removal expenses, article 3 of the suplemental Treaty of 1836 provided that any surplus of the $600,000 "which may remain after removal and the payment of the claims so ascertained, shall be turned over and belong to the education fund," in other words, shall belong to the nation. If the Cherokees paid for the removal, then the surplus should be divided as section 15 provides. If the government paid for the removal, then article 15 became inoperative. The supplemental articles of the Treaty of 1835-'6 constituted a first step towards settling the ambiguous and seemingly inconsistent provisions of articles 1, 8 and 15 of the treaty proper, and to that extent eliminated article 15. The account upon which we now rely has removed the last doubt, and the theory upon which article 15 was framed has been positively and permanently put out of the case.

Since there is this conflict in the Treaty of 1835, which position will the Eastern Cherokees take, or rather, which position are they compelled to take? One of the views expressed in the treaty must yield. Will the Eastern Cherokees stand upon article 15, which is inconsistent with the account stated; or, upon the general treaty promises, which have been sustained by the account rendered?

As between the Eastern and Western Cherokees, shall a provision for distribution prevail, which is based upon a theory which for the purposes of this discussion has been abandoned and which is here and now disclaimed by all the complainants? Shall this exceptional provision for specific payments, based upon a view which yielded in the conflict

of the treaty, outweigh the plain unqualified promise to pay the rightful owners for the lands? We submit that, considered in this aspect, the terms of the Treaty of 1835 send this fund where the account has placed it—into the hands of the Cherokee Nation, where, by the express terms of the union agreed upon in 1839, all interests and titles in common lands and common funds vested as per the following recital:

"And also that all rights and title to public Cherokee lands on the east or west of the river Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation, as constituted by this union" (R., 91).

The fund now in question arises under the affirmative obligations of the United States, expressed in several treaties, stripped of all inconsistencies and conditions that were injected into the Treaty of 1835 upon a mistaken theory that has now been disregarded by the United States and the Cherokees. The equitable considerations which the Eastern Cherokees urge, fail of support.

To the contrary the fund is carried precisely where it was placed by the agreement of 1891-'3 and the account rendered. In the language of the account, it is an "Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund."

The exclusive claim of those Eastern Cherokees who did not go west, and who never became members of the Cherokee Nation, is if possible even more untenable.

They were given certain rights, all of which have been satisfied. According to article 10 of the Treaty of 1835, the general payments went to the "whole Cherokee Nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee Nation west of the Mississippi river."

This provision appears to exclude these Cherokees from participation in the "amount which has been improperly charged to the treaty fund" of the Cherokee Nation.

Assuming that so much of the judgment of the Court of Claims as awards the sum of $1,111,284.70 to the Cherokee Nation is correct, and should be affirmed, still it is respectfully submitted that said judgment should be modified, in so far it directs distribution thereof to be made by the Secretary of the Interior directly to the Eastern and Western Cherokees, who were parties either to the Treaty of New Echota, as proclaimed May 23, 1836, or the Treaty of Washington, of August 6, 1846, as individuals, whether east or west of the Mississippi river, or to the legal representatives of such individuals.

Section 68 of the Act of July 1, 1902, conferring jurisdiction upon the Court of Claims to hear and determine this claim did not confer equity powers upon that court, nor upon this court, when exercising its appellate powers.

The jurisdiction conferred was strictly legal as opposed to equitable, and as above suggested, the Congress, by the subsequent act, March 3, 1903, was without lawful power to enlarge this jurisdictional power, or to alter the mode and manner of the distribution of funds of the tribe and "monies accruing under the provisions of this act," without the consent of the Cherokee Nation, formally expressed as provided for, by sections 74 and 75 of the former act.

In so far as the judgment of the Court of Claims contravenes the terms of the Act of July 1, 1902, in this and other respects, if any such appear, it should be modified and as so modified should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 346.

THE UNITED STATES, APPELLANT,

vs.

THE CHEROKEE NATION.

Office Supreme Court U. S.
FILED
JAN 29 1906
JAMES H. MCKENNEY,
Clerk.

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APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE CHEROKEE NATION.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20065

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The Cherokee Nation is a body politic. As such it was and still is competent to prosecute this suit in the name which the persons collectively composing the body long

since assumed and by which such persons acting collectively have been recognized and dealt with for many years past by the United States.

In an hysterical memorandum prefixed to their main brief, counsel for the Eastern Cherokees explain that though in said brief they have referred to the Cherokee Nation as a "body politic" "in the sense and to the extent only that it might be regarded as a government," nevertheless they "emphatically deny that the Cherokee Nation is a body politic, and do not concede that it ever has been a body politic or a body corporate recognized as such by the United States."

In both their main and reply brief they indicate a belief that there is a distinction, appreciable though subtle, between the Cherokee Nation when considered "as a tribe of Indians" and "as a body politic," and on page 4 of the latter brief they say:

> "It is obvious the suit of the Cherokee government appearing under the title 'Cherokee Nation' should have been brought by the title 'Cherokee Tribe' as instructed by the jurisdictional act. The tribe furnished the outlet, and the tribe was the principal in that contract of December 19, 1891, while the Cherokee government designated 'Cherokee Nation' was merely an agency through which the tribe acted. The agent is dead. The tribe survived."

The distinction sought to be drawn and the results which are supposed to follow from such distinction, if it exists, may not be of serious moment, but in order that one may not be misled either by the confusion of ideas under which counsel appear to labor or by the inaccurate statements of fact, it may not be amiss to reply briefly to these suggestions.

The first petition filed in these consolidated cases was filed in the name of the "Cherokee Nation," and asserted that said nation was "acting in its own behalf and in behalf of

the individuals who are members and citizens of said nation and interested in the subject-matter of this petition," and averred that—

"The Cherokee Nation, claimant herein, is and since the act of union between the Eastern Cherokees and Western Cherokees, on July 12, 1839, has been, a body politic, recognized and dealt with as such by the United States in all matters affecting the rights, interests, and property of the Cherokee Nation or Tribe, or the members thereof; and is as such the 'Cherokee Tribe' mentioned in section 68 of the act of Congress aforesaid (July 1, 1902) and authorized thereby to bring this proceeding."

An early edition of Bouvier defines "body politic" to be—

"The collective body of a nation under civil government. As the persons who compose the body politic so associate themselves, they take collectively the name of the people or nation."

A more recent authority (the Century Dictionary and Cyclopedia) under the word "politic," proffers this definition:

"That (what) constitutes the State; consisting of citizens; as the body politic (that is, the whole body of the people as constituting a State)."

And cites by way of illustration a portion of the preamble of the "Covenant of Plymouth Colony," as follows:

"We the loyal subjects of * * * King James * * * do by these presents solemnly and mutually, in the presence of God and one another, covenant and combine ourselves into a civil body politic." * * *

A State is undoubtedly a body politic, and the terms "Nation" and "State" are frequently employed not only in the law of nations, but in common parlance as importing the same thing; but it is said that the term "Nation" is more strictly synonymous with *people* than with the term

"State," and while a single State may embrace different nations or peoples, a single Nation may be so divided politically as to constitute several States.

As early as 1831 this court decided that the Cherokee people constituted a State and that they had been uniformly treated as such

"from the settlement of our country. The numerous treaties made with them by the United States, recognized them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for a violation of their engagements, or for any agression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts."

Cherokee Nation *vs.* Georgia, 5 Peters 1, 16.

Since the rendition of that judgment the right of the Cherokee people to maintain an action in the name of the Cherokee Nation would seem to have been put beyond dispute.

When the ancient Cherokee Nation by an agreement amongst its citizens approved by the United States separated into two bodies, such bodies so long as they remained separate communities possessed severally all the attributes of political sovereignty which the ancient nation had theretofore possessed and were so recognized by the United States.

When in 1839 the Eastern and Western Cherokees became reunited they declared in a solemn act of union seemingly modeled upon the declaration of the Plymouth Colony above quoted that

"We, the people composing the Eastern and Western Cherokee Nations, in national convention assembled, by virtue of our original and unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic under the style and title of the Cherokee Na-

tion. * * * And, also, that all rights and titles to public Cherokee land on the east or west of the River Mississippi, with all other public interests which may have been vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpared in the Cherokee Nation as constituted by this union."

Notwithstanding learned counsel for the Eastern Cherokees solemnly deny that any such act of union was adopted or, if adopted, that it had any valid force, still such act of union has heretofore been recognized by this court (The Cherokee Trust Funds, 117 U. S., 288, 303–5: United States *vs.* Old Settlers, 148 U. S., 427, 444) and the "Cherokee Nation" thereby created has been repeatedly recognized by the Congress (Treaty August 6, 1846; Treaty July 19, 1866; Treaty April 27, 1868; Agreement of December 19, 1891, for sale of Cherokee Outlet as ratified and confirmed by act of March 3, 1893, and other acts and appropriation laws too numerous to cite).

It is true that section 68 of the act of July 1, 1902, confers jurisdiction upon the Court of Claims to adjudicate any claim which the "Cherokee *tribe*, or any band thereof," may have against the United States, but it is also true that section 1 of said act specifically declares that—

"The words 'nation' and 'tribe' shall each be held to refer to the *Cherokee Nation* or tribe of Indians in Indian Territory."

Whatever criticism might have been justified by the institution of this action under the title of "The Cherokee Tribe," it would seem to be certain that no foundation for just criticism arises out of the fact that it was instituted under the title of "The Cherokee Nation."

Again, it is asserted by learned counsel for the Eastern Cherokee (Reply Brief, pp. 2–3), "that the 'Cherokee Nation'

as a government did not own the Outlet. The Outlet was the property of the Cherokee tribe, 'of the whole Cherokee people' under article 1, treaty of 1846."

This suggestion was laid at rest forever by the decision of this court in the case of the Cherokee Trust Funds (117 U. S., 288, at p. 308), where, considering the claim of the Western Cherokees to exclusive participation in the proceeds of the sales of certain lands in the Cherokee Outlet, under the provisions of the treaty of July 19, 1866, this court said:

"Their claim, however, rests upon no solid foundation. The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest, as a tenant in common, that he could claim a *pro rata* proportion of the proceeds of sales made of any part of them. He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States. Our Government, by its treaties with the Cherokees, recognized them as a distinct political community, and so far independent as to justify and require negotiations with them in that character. Their treaties of cession must, therefore, be held not only to convey the common property of the Nation, but to divest the interest therein of each of its members."

It has been repeatedly urged by counsel for the Eastern Cherokees that judgment should not be affirmed in favor of the "Cherokee Nation," because the nation could neither receipt for nor distribute the proceeds of any such judgment. Likewise the burden of complaint on the part of other counsel for individual Eastern Cherokees was that if the judgment of the Court of Claims should be sustained and the nation as such permitted to distribute the proceeds thereof, such individual Eastern Cherokees would receive little or

no consideration, and would probably receive nothing as its share.

And, again, it is suggested that certain provisions of the acts of Congress of June 7, 1897, and June 28, 1898 (30 Stats., 62, 83, 502 *et seq.*), had had the effect of practically abolishing the Cherokee government, and that section 19 of the latter act had specifically prohibited the "payment of any moneys on any account whatever" "by the United States to any of the tribal governments or any officer thereof."

Without pausing to consider whether in fact either of the last-mentioned statutes has any real bearing upon the matter in hand, it would seem to be sufficient to say that the Congress itself by the act of July 1, 1902 (32 Stats., 716), authorizing the Cherokee Nation in express terms to institute this suit, distinctly recognized the continued existence of the "tribal government of the Cherokee Nation," and with the assent of the nation itself provided for its discontinuance only after March 4, 1905 (sec. 63, act July 1, 1902, 32 Stats., 716).

It is true that for some years past the Cherokee Nation has been without tribal courts, and by paramount authority its people and their property rights have been subjected to the judicial processes of the courts of the United States, but that fact has not served to lessen the hold of the nation upon the national property or funds or claims.

If it be true that by the provisions of the act of June 28, 1898, alluded to, and to the terms of which the Cherokee Nation seemingly did not assent, the United States was prohibited from making payments to the tribal government or any officer thereof for disbursement, that fact would be of no moment here, for the Cherokee Nation is not asking the payment of the proceeds of this judgment to itself in its tribal or governmental capacity or to any of its officers, so that it or he may control the distribution thereof. On the contrary, the Cherokee Nation, claimant, recognizing the

binding force of the various provisions of the jurisdictional act of July 1, 1902, complains of the judgment of the Court of Claims upon the sole ground that that court has directed the distribution of the proceeds of the judgment, which proceeds would clearly constitute "monies accruing under the provisions of this act" (sec. 66) in a manner other than that distinctly prescribed in said act, to which the legal voters of the Cherokee Nation in national election assembled fully assented.

Both the act of 1898, upon which counsel for the Eastern Cherokees lean, and said act of 1902 provide for the distribution of national and *per capita* funds through the Secretary of the Interior. Neither the Cherokee Nation, nor its national council, nor any of its executive officers pretend any claim of right to receive, either officially or individually, the proceeds of any judgment which may go in favor of the nation, but they do assert that such proceeds when payable will constitute common property of the nation or tribe, distributable in accordance with the terms of the act of 1902, and not otherwise.

If the act of March 3, 1903, be supposed to authorize any different method of distribution of common property than that provided for by said act of 1902, then it is to such extent at least invalid, for it has never received the assent of the communal owners of the property affected by it.

It is also said that the Cherokee Nation, as such, had prior to July 1, 1902, expressly conceded the exclusive right of the Eastern Cherokees to the proceeds of any judgment which might be obtained upon the item here in dispute. If this be true in point of fact, it does not so appear from the record in this cause, and no proof of such fact was offered.

It is quite true that attorneys for the Eastern Cherokees in their intervening petition filed in case No. 23,199 (R., 39–40) asserted that the Cherokee national council, by

an act on December 7, 1900, expressly conceded the exclusive right of the Eastern Cherokees to the moneys in question, but this averment was expressly traversed by the Cherokee Nation, which denied the existence of any such act as was described, and no proof in support of such averment was offered on behalf of the Eastern Cherokees. The fact is that if any such act was passed by the national council it was expressly disapproved by the President of the United States in the exercise of his supervisory authority under the act of Congress in such case provided (31 Stats., 1058, 1077).

If such supposed act of the Cherokee council constitutes the "last will and testament" of the Cherokee Nation, to which counsel refer on page 7 of their reply brief, it can have no effect upon this controversy, for it has been denied probate by an authority possessed of exclusive jurisdiction in the premises.

Whatever may have been the view of the Cherokee national council in the premises, it was clearly subject to the subsequent action of the Cherokee people composing the Cherokee Nation, as evidenced by the acceptance of the provisions of the act of July 1, 1902, which must constitute the rule and measure by which this branch of the contention before the court must be settled.

By that act and its ratification both the people of the nation and the Congress of the United States provided generally for the institution of the present suit on behalf of the former, and specifically indicated the manner in which attorneys on behalf of the nation should be employed and how they should be compensated. It is conceded that the Eastern Cherokees since 1839, by force of numbers, have dominated the Cherokee Nation. As the dominant party in the nation their votes served to ratify the agreement of July 1, 1902. It is not denied that the attorneys representing the nation have been employed and arrangements have been

made for their compensation in accordance with the provisions of said agreement. Nor is it denied that they have rendered some service in the prosecution of the case. So far such services appear to have been to a degree at least effective; whether ultimately they will appear to have been so must abide the mandate of this court. If the Eastern Cherokees for any reason deemed it desirable that they should be represented doubly before the trial and appellate tribunals, first, as members of the nation, and, second, as a separate band, they no doubt had the right to so elect and to contract accordingly, but exactly why their separate attorneys should seek to raise any question concerning the compensation of the attorneys for the nation is not perceived. If the judgment of the Court of Claims in favor of the nation should be affirmed, the contract heretofore entered into between the nation and its attorneys, formerly approved by the Commissioner of Indian Affairs and the Secretary of the Interior and filed in the Department of the Interior, as required by law, will probably be found to sufficiently protect the rights of the parties thereto. No question upon this score was determined by the Court of Claims, and in the absence of the contract itself, or any copy thereof in the record, it would not seem to be open for consideration by this court. With respect to the allowances of fees and expenses to attorneys otherwise situated, all question was reserved by the Court of Claims until the coming in of the mandate of this court, and no question has been raised upon the record concerning such action.

Unless the judgment in favor of the Cherokee Nation by name should be affirmed, the question of the right of the attorneys appearing on behalf of the nation to receive compensation for services rendered will be of but little moment.

It is suggested, however, that this court should interfere in the matter of the allowance of fees to the attorneys for the nation because the nation is prosecuting this claim in

opposition to the vast body of its citizens, viz., the Eastern Cherokees, and that, therefore, even in the event of a successful outcome, the proceeds of the judgment ought not to be reduced by the expenses of the nation in obtaining it because of the individual interest of the Eastern Cherokees therein. The fallacy of this objection is too obvious to require extended comment. The nation in prosecuting this claim is acting on behalf of all of its members and with the assent of the majority of its members, as evidenced by their ratification of the act of 1902, under which the action was brought. Neither the nation nor its attorneys oppose the claim of the Eastern Cherokees as component members of the nation to recover under and through the latter their proportionate shares of the item in controversy, such shares to be determined and distributed as provided in the act of 1902. The sole opposition between the nation and the Eastern Cherokees, individually or as a band, grows out of the contention of the latter to an exclusive right which is put forth under the provisions of the act of March 3, 1903, to which act neither the nation nor its citizens ever assented. It does not appear, indeed, that either the nation or any of its component elements have ever been made aware of the terms of said act of 1903, nor can it be gleaned from the record at hand that the Eastern Cherokees are in fact represented by attorneys employed by "the band acting through a committee recognized by the Secretary of the Interior" or "by their proper authorities."

As above stated, the nation, as will appear from its petition, sues in its own behalf and "in behalf of the individuals who are members and citizens of said nation" (R., 1), and the denial contained in its replication (R., 40) must be read in the light of the above averment and held to refer, as was the intention, to the Eastern Cherokees acting as a band and not to refer to them in their individual capacities as citizens of the nation.

The futility of the claim of exclusive right put forth in behalf of the Eastern Cherokees generally is demonstrated by the decision and opinion of this court in the case of the *Old Settlers vs. United States*, 148 U. S., 427, 471, *et seq.*, and the utter want of foundation for the suggestion of right of participation on the part of these Eastern Cherokees and their descendants who never went West, but severed their relations with the nation or tribe and became citizens of Georgia, will fully appear from a review of the opinion of this court in the case of *The Cherokee Trust Funds*, 117 U. S., 288, 308–310.

The two cases last cited review all the complicated tangle of treaties and statutes pertaining to the relations between the United States and the Cherokee Nation prior to the agreement of December 19, 1891, which together with the act of Congress of March 3, 1893, affords solid support for the present contentions on behalf of the nation. In the absence of the agreement of 1891 and the act of 1893 the pending claims in their present form as presented on behalf of the several claimants could not be maintained in favor of any of the claimants, notwithstanding the provisions of the act of July 1, 1902, for each of the claimants rests its claim upon the accounting made and rendered by the United States to the Cherokee Nation under the provisions of said act. In the absence of the act of 1893 such accounting, even if made, would have been without validity and of no binding force. It would seem that the Eastern Cherokees, acting as a separate band, could not rely upon the accounting rendered under the act of 1893 and the agreement of 1891 therein referred to, and at the same time avoid legal consequences which necessarily follow from their plain terms.

Under the treaty of 1846 the *per capita* distribution to both Western and Eastern Cherokees growing out of the sales of lands east of the Mississippi had been fully and, as it was then thought, finally provided for. Whatever else

might be due from the United States on such account was communal and belonged to the whole Cherokee people as such. Both the Cherokee people and the United States so understood the matter, as the agreement of 1891 and the act of 1893 amply evidence. It was the nation that asserted that a balance was due to it on account of the cession of the lands east, and it was to the nation that the United States agreed to account and to pay any balance which might be found to be due. It was to the nation that the account showing a balance in its favor was submitted, and it was the nation, solemnly acting by resolution of its national council, that accepted the account as rendered and requested payment from the United States of such balance due. It was with the nation that the United States contracted as per the act of July 1, 1902, and the contract was none the less a national contract, because it provided therein that it was to be ratified by the majority vote of its qualified individual citizens.

This case presents complications and grave difficulties only when the contentions of the individuals, as opposed to the contention of the body politic, are brought into the foreground. So long as the matter is considered solely as between the United States and the Cherokee Nation, all questions pertaining both to the right of recovery and the method of distribution to ultimate beneficiaries are devoid of complexity, for elemental principles of law control the one, while the terms of the act of 1902 control the other.

It seems to be unnecessary to say anything further upon the subject of interest. By the account which the Interior Department, acting under the authority of Congress, as expressed in the act of 1893, rendered to the Cherokee Nation the claim of the latter for interest upon the principal sums was expressly conceded and the principal items were declared to be due with interest from specified dates. Balances shown by said account rendered by the United States

to be due to the nation " with interest at the rate of five per cent. per annum from the various dates," &c., &c., was accepted by the latter as correct and payment thereof requested from Congress. The Congress has neither repudiated the account as rendered nor denied the right of the nation to receive interest as well as principal in payment.

The act of 1902 conferred jurisdiction upon the Court of Claims without restriction in either respect, and the principles which justified this court in giving judgment for interest in the Old Settlers case (*ubi supra*), when applied to the facts of this case, would seem to require the allowance of interest here.

The learned assistant attorney general concedes that interest was properly allowed by the accountants upon three of the four items covered by the judgment under review, that with respect to such items the accountants had power and authority to consider the claim for interest, and if found to be well founded to award it. But he asserts that the same accountants in regard to the fourth item were without power to award interest, even though they may be found to have acted rightly in finding that the principal sum was due.

The power of the accountants and of their official superiors under the act of 1903 was the same with respect to one item as it was with respect to the other. No restrictions or limitations were laid upon them save that the claims which they were to adjust by the account to be rendered were those relating to moneys " due to the Cherokee Nation " under certain specified treaties and laws of Congress. If they had authority to find for interest in respect of any item they had it in respect to all.

It has been strenuously contended on behalf of the United States that the " expert persons " employed under the act of 1893 to render the account of moneys due the Cherokee Nation exceeded the authority with which they were endowed,

and in proof of this reference is made to the communication of February 6, 1892, from the Commissioner of Indian Affairs to the Secretary of the Interior on the subject of an appropriation to be made for the purpose of defraying the expenses of the accounting (see brief on behalf U. S., p. 25), but the learned assistant attorney general seems to have entirely overlooked the fact that both the Commissioner of Indian Affairs and the Secretary of the Interior approved and adopted their report when it was submitted in due course, and neither of those officials appears to have thought either that the accountants had exceeded their authority or had acted otherwise than had been contemplated at the time of their employment.

The contemporaneous acceptance of the result of their labors without objection on the part of the executive officials, whose duty it was to construe and execute the law under which the accountants were acting, should have great weight with any court, and the fact that Congress, when the report was brought to its attention, did not declare it invalid because not rendered in accordance with its prior law on the subject would seem to put an end to further contention on that score.

EDGAR SMITH,
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Attorneys for the Cherokee Nation.

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Supreme Court of the United States

OCTOBER TERM, 1905

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FILED
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JAMES H. McKENNEY,
Clerk

THE UNITED STATES, *Appellant*
vs.
THE CHEROKEE NATION } No. 346.

THE EASTERN CHEROKEES, *Appellants*
vs.
THE CHEROKEE NATION } No. 347.

THE CHEROKEE NATION, *Appellant*
vs.
THE UNITED STATES } No. 348.

IN APPEAL FROM THE COURT OF CLAIMS

BRIEF

For the Eastern and Emigrant Cherokees

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Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, *Appellant* vs. THE CHEROKEE NATION	No. 346.
THE EASTERN CHEROKEES, *Appellants* vs. THE CHEROKEE NATION	No. 347.
THE CHEROKEE NATION, *Appellant* vs. THE UNITED STATES	No. 348.
THE EASTERN AND EMIGRANT CHEROKEES, *Appellees* vs. THE UNITED STATES	~~No. 348.~~

IN APPEAL FROM THE COURT OF CLAIMS

Brief for the Eastern and Emigrant Cherokees

1. *Status of Appeal.*

This appeal is from a final decree in the Court of Claims in the consolidated cases Nos. 23199—23212, and 23214 passed upon by the Court of Claims as of date May 18, 1905; the first named having been brought under the act of July 1, 1902, and Feb. 20, 1903, and the last two under the act of March 3,

1903, No. 23212, Mar. 10, 1903, and No. 23214, Mar. 14, 1903, as found on page 16 and 17 of the Indian Appropriation Bill, 2nd sess. 57th Congress, Public 144, "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites, and for other purposes." This act was intended to supercede and correct the Act of July 1, 1902, of the 1st sess. 57th Congress, Public 241, under which suit No. 23109 was brought, and in which claimant in Nos. 23212 and 23214 appear as intervenors; the latter of date Dec. 22, 1903.

2. *The Bone of Contention*

Is the second item of the award and accounting made by said James A. Slade and Joseph T. Bender, referred to in the findings and in the words and figures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

"The statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement; [a number of demands made by the Cherokee Nation were disallowed], and the result of the finding is submitted in the following schedule:

"Under the treaty of 1819:	
"Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'School' fund	$2,125.00
"(With interest from February 27, 1819, to date of payment.)	
"Under treaty of 1835:	
"Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund	1,111,284.70
"(With interest from June 12, 1838, to date of payment.)	
"Under treaty of 1866:	
"Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation	432.28

"(With interest from January 1, 1874, to date of payment.)

"Under act of Congress, March 3, 1893:

"Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund 20,406.25

"(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)"

Washington, D. C., April 28, 1894.

(Signed) JAS. A. SLADE.
JOS. T. BENDER.

3. *The Award*

Or finding of the Special Commission, Messrs. James A. Slade and Joseph T. Bender, or special accountants as they were called, appointed by the Secretary of the Interior under the act of March 3, 1893 (27 Stat. L. pp. 612, 643 p. 10) by which Congress appropriated $5,000 for the making of said accounting was the result of previous negotiations between the United States and the Cherokee Nation in which the United States were intent upon the purchase of the Cherokee Outlet, or Oklahoma Strip from the Indians, known as

4. *The Cherokee Agreement.*

"In making the settlement of 1851 the accounting officers of the Government charged against the Cherokee five-million-dollar trust fund the sum of $1,111,284.70 on account of removal expenses. The appropriations made by Congress July 2, 1836, of $600,000, and of June 12, 1838, of $1,047,067 were made primarily to meet the expenses of removing the Cherokees to the Indian Territory.

"The Court of Claims finds, as a matter of fact, that only $382,201.22 was paid from the amount appropriated for removals ($1,647,067) by the act of July 2, 1836, and June 12, 1838, while the greater part of the expenses of removing the Eastern Cherokees, to wit, $1,111,284.70, was, in fact, charged against the five-million-dollar trust fund. Congress, in the act

of June 12, 1838, expressly provided that no part of the sum appropriated by that act for removal should be deducted from the five millions stipulated to be paid said Indians.

"When the United States sought to purchase the Cherokee Outlet in 1891, a tract of land embracing 8,144,182.91 acres, constituting the northern part of Oklahoma, the Cherokees again renewed their contention that their $5,888,000 trust fund had been improperly charged with the expense of the removal to the Indian Territory. Accordingly, on the 19th of December, 1891, an agreement was entered into between the Cherokee Nation and the United States for the sale of the Cherokee Outlet, being the agreement referred to and described in the act of March 3, 1893 (27 Stat. L., 640, sec. 10), whereby it was provided, among other things, that—

"Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the National Council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its National Council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, and under any of said treaties or laws which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its National Council, such appropriation to be made by Congress,

if then in session, and if not, then at the session immediately following such accounting. (Senate Ex. Doc. 50, Fifty-second Congress, first session, 27 Stat. 643.)" (Finding IX.)

"Congress, on March 3, 1893 (27 Stat. L., 640), ratified the Cherokee agreement, and on the same day (27 Stat. L., 643) appropriated $5,000 for the employment of experts to render a complete account of moneys due the Cherokees, as required in the fourth subdivision of article 2 of said agreement. Under this provision Messrs. James A. Slade and Joseph T. Bender were appointed commissioners to render the account referred to in said agreement. The commissioners made their report, bearing date April 28, 1894, whereby, among other things, they reported that there had been improperly charged to the $5,000,000 treaty fund the sum of $1,111,284.70 on account of the amount paid for the removal of the Eastern Cherokees to the Indian Territory, and that this sum, with interest from June 12, 1838, to date of payment, was due under the fifteenth article of the treaty of 1835.

"The Court of Claims finds as a fact that the account stated by Messrs. Slade and Bender was rendered to the Cherokee Nation and duly accepted by act of their national council in the manner and form provided in the agreement, and that no suit has been brought by the Cherokee Nation against the United States in the Court of Claims charging that such account was incorrect or unjust. (C. C. R.)

"On January 7, 1895, the Secretary of the Interior transmitted the account stated to the Speaker of the House of Representatives, as follows, to wit:

"DEPARTMENT OF THE INTERIOR.
"*Washington, January 7, 1895.*

"SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stat., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties or any of them,

into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of the Cherokee national council accepting such accounting.

"Very respectfully,

"HOKE SMITH, *Secretary.*

"THE SPEAKER OF THE HOUSE OF REPRESENTATIVES."

5. *Suit No.* 10386 *Congressional.*

This suit No. 349 was preceded in the Court of Claims by suit No. 10386 Congressional, of that court, decided Apr. 28, 1902, entitled "The Eastern Cherokees vs. The United States," in which "The Eastern and Emigrant Cherokees" appear as intervenors, and which was brought under the Bowman Act, which only permitted the court to make "Findings of Fact," as follows:

COURT OF CLAIMS, CLERK'S OFFICE,
Washington, May 2, 1902.

SIR: Pursuant to the order of the court, I transmit herewith a certified copy of the findings filed by the court in the aforesaid cause, which case was referred to this court by the resolution of the Senate of the United States under the act of March 3, 1883.

I am, very respectfully, yours, etc.,

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

HON. WILLIAM P. FRYE,
President of the Senate pro tempore.

[In the Court of Claims, Congressional, No. 10386. Decided April 28, 1902. The Eastern Cherokees vs. The United States.]

STATEMENT

The claim in the above-entitled case was transmitted to the court by resolution of the United States Senate February 20, 1901, as follows:

"*Resolved*, That the bill (S. 3681) entitled 'A bill for the payment of the award of the Secretary of the Interior in favor of the Cherokees, made under the provision of the act of Con-

gress of March third, eighteen hundred and ninety-three,' now pending in the Senate, together with all the accompanying papers, be, and the same is hereby, referred to the Court of Claims, in pursuance of the provisions of an Act entitled 'An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' approved March 3, 1883; and the said court shall proceed with the same in accordance with the provisions of such act, and report to the Senate in accordance therewith."

Senate bill 3681, referred to in the above resolution, is as follows:

"A bill providing for the payment of the award of the Secretary of the Interior in favor of the Cherokees, made under the provision of the act of March third, eighteen hundred and ninety-three.

"Whereas by the act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seven Statutes, six hundred and forty), the so-called Cherokee agreement was 'ratified by the Congress of the United States,' * * * and it was agreed therein that 'the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States;' and

"Whereas in said Cherokee agreement it was expressly provided that 'the United States shall without delay render to the Cherokee Nation' 'a complete account of moneys due the Cherokee Nation under any of the treaties,' and 'if it shall be found upon such accounting that any sum of money has been so withheld the amount shall be duly appropriated by Congress' 'at the session immediately following such accounting,' and

"Whereas the said act of Congress appropriated the sum of five thousand dollars (Twenty-seven Statutes, six hundred and forty-three), 'to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required by the fourth subdivision of article two of said agreement;' and

"Whereas James A. Slade and Joseph T. Bender were duly appointed by the Secretary of the Interior as experts to render the account as above authorized by Congress, and did on April twenty-eighth, eighteen hundred and ninety-four, report and render an account of certain sums due the Cherokee Nation, with interest thereon as itemized and set forth on page thirty-two, House of Representatives Executive Document Numbered One hundred and eighty-two, Fifty-third Congress, third session; and

"Whereas the Secretary of the Interior did, on January seventh, eighteen hundred and ninety-five, transmit, in compliance with the provision of the third subdivision of article two of the agreement made December nineteenth, eighteen hundred and ninety-one, with the Cherokee Indians, the above complete account of moneys due the Cherokee Nation, prepared in accordance with the provisions of the said act of March third, eighteen hundred and ninety-three, together with a certified copy of an act of the Cherokee national council accepting said accounting: Now, therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to refund to the five million dollar fund of the Eastern Cherokees the amount erroneously withdrawn therefrom on account of the removal of the Eastern Cherokees under the treaty of eighteen hundred and thirty-five to the Indian Territory, together with interest thereon, as found due by James A. Slade and Joseph T. Bender, expert accountants, acting under the direction of the Secretary of the Interior, in pursuance of the provisions of the act of Congress of March third, eighteen hundred and ninety-three, said interest to be computed at the rate of five per centum per annum from June twelfth, eighteen hundred and thirty-eight, until paid, in accordance with the resolution of the Senate of the United States of September fifth, eighteen hundred and fifty; and the Secretary of the Treasury is hereby directed to pay the principal and interest of said sum to the Eastern Cherokee Indians, per capita, in accordance with the ninth article of the treaty of eighteen hundred and forty-six."

The case was brought to a hearing on its merits on the 24th day of March, 1902. Robert L. Owen, Esq., was heard for the Eastern Cherokees residing in the Indian Territory; Mrs. Belva A. Lockwood was heard for certain individual Cherokees residing, some in the Indian Territory and some in the State of North Carolina, etc.; R. V. Belt, Esq., was heard for the Eastern Cherokees residing in the State of North Carolina and in other States east of the Mississippi, and L. T. Michener, Esq., was heard for the Cherokee Nation; and the Attorney-General, by George H. Gorman, Esq., his assistant, and under his direction, appeared for the defense and protection of the interests of the United States.

The court, upon the evidence and after considering the briefs and arguments of counsel on both sides, makes the following findings of fact: * * *

(These findings are lengthy—quite in detail, and do not differ materially from the findings presented to this court on appeal, and are set forth in full in our Findings of Fact and Brief to the court below, except as to the conclusions of law and judgment, and close as follows: after reciting the Cherokee agreement. * * *

In these Findings there was no right of appeal, and really nothing to appeal from, but they formed a necessary incident to this case.)

"The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement, and the result of the finding is submitted in the following schedule:"

"Under the treaty of 1835: Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to the treaty fund, $1,111,284.70, with interest from June 12, 1838, to date of payment."

X. The account as thus stated by Messrs. Slade and Bender was rendered to the Cherokee Nation and duly accepted by act of their national council in the manner and form provided in the agreement, and no suit has been brought by the Cherokee Nation against the United States in the Court of Claims charging that such account was incorrect or unjust.

By the Court.

Filed April 28, 1902.
A true copy.
Test this 29th day of April, 1902.
[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

6. *The Eastern and Emigrant Cherokees.*

The counsel for the Eastern and Emigrant Cherokees in cause No. 23,212, accepted these findings of the court, adopted them in the case 23,212, and requested the court to find further as follows:

XI. This account was transmitted to the Secretary of the Treasury, and he replies that he has "nothing to add to the (Slade and Bender) report."

XII. It was promptly presented to the Secretary of the Interior, who accepted it without demurrer or objections and January 7, 1895, was transmitted by that official to the Speaker of the House of Representatives for an appropriation, and was in course duly submitted to the Committees on Indian Affairs.

XIII. The Senate Committee on Indian Affairs, May, 1902, appointed a sub-committee composed of Senators John T. Morgan, Porter J. McCumber, and Matthew S. Quay to confer and report on Senate Bill No. 58685, second session, Fifty-seventh Congress, which had been introduced into that body for the payment of the award of the Commission. This Commission reported, p. 5: "Your Committee find that the account stated by the Interior Department, in accordance with the fourth sub-division of article 2 of the Cherokee Agreement above cited, *constitutes an award*: That it was made in pursuance of a carefully drawn contract, with the express stipulation in the face of the contract that 'if it be found on such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress.'" Again, on page 6: "Your Committee find that, under the principles laid down in the opinion of the Supreme Court of the United States, the award rendered under the contract of December 19, 1901, *must be held as conclusive.*" Their report closes, p. 8: "Your Committee therefore recommend that said bill be

passed."

XIV. That the amount thus found by the Commission, Messrs. Slade and Bender, of $1,111,284.70, with interest at 5 per cent from June 12, 1838, to date of payment, in accordance with treaty stipulations, is due to the Eastern and Emigrant Cherokees, whose names, or those of whose ancestors are found on the Cherokee rolls of 1835-6 and 1852, about 4,000 of whom still reside in North Carolina, north Georgia, northern Alabama and eastern Tennessee, and a much larger number, to wit, about seventeen thousand persons, who have removed to the Indian Territory, some of whom form a part, and some do not, of the Cherokee Nation, so called, but all the persons enumerated herein are entitled to participate in this fund, all having Cherokee Indian blood, and the sale of whose lands in the States enumerated in 1835, constitutes the base of the interest bearing fund of $5,000,000, from which the amount claimed was improperly taken. Rolls of 1838 gives 16,211 removed and 2,202 remaining.

XV. The Court further finds that one-fourth of the whole amount claimed, with interest thereon at 5 per cent from June 12, 1838, is due to the claimants whose names are enumerated, and powers of attorney filed in the within cause, No. 23,212, in accordance with their numbers, and that judgment should be rendered to them for that amount, as required by the statute.

BELVA A. LOCKWOOD,
Counsel for Eastern and Emigrant Cherokees.

7. *Belong to the Cherokee People.*

To eliminate any surplus matter and to avoid confusion, the court will note that the claimants, the Cherokee Nation, the Eastern and Emigrant Cherokees, and the Eastern Cherokees, in the three consolidated cases, all agree that the sums set forth in the several items are due to the Cherokee people from the United States, and that the defendant does not appeal from this portion of the decree. There is no dispute between the claimants, or even with the Government about the arithmetic of the accountants, or the precise sum named in the litigation.

The former Government counsel in this case, Mr. Gorman, cited the case very tersely when he said:

"There is really no controverted question of fact presented in this case for the determination of this Court. The facts are historical in their nature. * * * Are not subject of dispute or controversy. The question presented by the record is purely one of law, to wit, whether the cost of the removal of the Eastern Cherokees to the Indian Territory is to be borne by the Cherokee Nation and deducted from the treaty fund, or whether the cost thereof is to be defrayed by the United States without charge to the Indians." This is very tersely and correctly put, and is the gist of the whole matter; and the words of the treaty are so clearly stated that it seems impossible to mistake its meaning.

Again he says: "Neither party has questioned the accuracy of this report upon any question of fact, so that if the charge for removing the Indians is to be borne by the United States, that sum is properly due to the Indians, and, otherwise, it is properly chargeable to the treaty fund." The Court of Claims has decided that the sum in controversy is due to the Cherokees.

8. *They Further Agree*

as the court will note, that the three items of the award numbers one, three, and four are conceded to belong to the Cherokee Nation without demurrer or discussion, as named by the court, or rather as we think to the Cherokee people; the court says "to the Cherokee Nation as a political or social body." This alone carries with it a judgment in the case in favor of the Cherokee Nation, and satisfies the terms of the agreement. We think that it should be the Cherokee people for whom they stood, but are not disposed to contest it, as the Cherokee Nation as it now stands has become a close corporation without even corporate powers—cannot sue or be sued,

and is on the verge of dissolution. This also conforms to the agreement, which the court below seems to have carried in its mind, and to have interpreted as meaning the whole award, as the Cherokee Nation could only stand at best with reference to the Eastern and Northern Carolina Cherokees, or for the Eastern and Emigrant Cherokees, as a naked trustee, and they have therefore, erroneously, as we think, adjudged to them the whole matter in issue in these words: "That the Cherokee Nation do have and recover of and from the United States as follows:" naming the four items of the award.

9. *The Difference in the Findings.*

The difference in the findings of the several parties in interest are for the most part more technical than material, some of them clerical, with the exceptions of vital matters discussed hereafter. The decree, based upon the opinion of the court of March 20, 1905, and of May 18, 1905, with the conclusions of law, signed and transmitted to the clerk of court for entry by Chief Justice Nott, are as follows:

10. *Conclusions of Law.*

"Upon the foregoing facts the court concludes as matters of law:

"First. That the United States is indebted to the Cherokee Nation in the following amounts, viz.:

"(1) The sum of $2,125, with interest at 5 per cent from February 27, 1819, to date of payment;

"(2) The sum of $1,111,284.70, with interest at 5 per cent from June 12, 1838, to date of payment;

"(3) The sum of $432.28, with interest at 5 per cent from January 1, 1874, to date of payment;

"(4) The sum of $20,406.25, with interest at 5 per cent from July 1, 1893, to date of payment,

and is entitled to have judgment entered in its favor against the United States therefor.

"Second. The proceeds of so much of said judgment as pertains to the items numbered 1, 3, and 4 equitably belong to the

Cherokee Nation as a political or social body, and such proceeds, less any proportion thereof which the Cherokee Nation may have contracted to pay on account of counsel fees and other expenses of this litigation, should be paid or disposed of as follows, viz:

"(a) The amount represented by item numbered three (3) for $432.28, and interest, should be paid to the treasurer of the Cherokee Nation, or to such other person or officer either of the nation or of the United States as may hereafter succeed to his duties;

"(*b*) The amount represented by item numbered one (1), for $2,125 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the principal of the 'Cherokee school fund,' of which fund the United States are trustees;

"(*c*) The amount represented by item numbered four (4), for $20,406.25 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the 'Cherokee national fund,' of which fund the United States are trustees;

"(*d*) The amount represented by item numbered two (2) for $1,111,284.70 and interest, less counsel fees and expenses, equitably belongs to the Eastern and Western Cherokees who were parties either to the treaty of New Echota, proclaimed May 23, 1836, or the treaty of Washington, of August 6, 1846, *as individuals*, whether east or west of the Mississippi River, and should be paid to them or to their legal representatives by the Secretary of the Interior."

(If the court means in clause "d" only those Cherokees who were parties to the Treaty of 1836 and 1846, then we agree with it.)

"Third. Such counsel fees as may have been contracted to be paid by the Cherokee Nation in the manner prescribed by sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and such other counsel fees and expenses as may be allowed by this court pursuant to the provisions of the act of March 3, 1903, set forth in Finding of Fact No. I, should be paid to the parties entitled to receive the same by the Secretary of the Treasury upon the making of an appro-

priation by Congress for the payment of the judgment in this cause.

"Fourth. The cost and expenses incident to ascertaining and identifying the individuals entitled to participate in the distribution of the balance of the amount represented by item numbered two (2), and the making of the distribution thereof, should be a charge upon such balance for distribution and should be deducted therefrom."

11. *Court of Claims.*

(Record, page 112.)

No. 23199.

THE CHEROKEE NATION v. THE UNITED STATES.

No. 23214.

THE EASTERN CHEROKEES v. THE UNITED STATES AND THE CHEROKEE NATION.

No. 23212.

THE EASTERN AND EMIGRANT CHEROKEES v. THE UNITED STATES.

JUDGMENT ENTERED MAY 18, 1905.

The above causes, on motion and by consent of the parties, having heretofore been consolidated for purposes both of hearing and judgment by appropriate order of this court, came on to be heard upon the pleadings, orders, and proofs, and were argued by Messrs. Charles Nagel, Edgar Smith, and Frederic D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson, on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood, on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney-General Pradt, on behalf of the United States; and the court being now sufficiently advised in the premises, it is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of $2,125.00

With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.

Item 2. The sum of 1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

Item 3. The sum of 432.28
With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.

Item 4. The sum of 20,406.25
With interest thereon from July 1, 1903, to date of payment.

The proceeds of said several items, however, to be paid and distributed as follows:

The sum of $2,125 with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation and shall be credited on the proper books of account to the principal of the "Cherokee school fund" now in the possession of the United States and held by them as trustees.

The sum of $432.28 with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the "Cherokee national fund," now in the possession of the United States and held by them as trustees.

The sum of $1,111,284.70, with interest thereon from June 12, 1828, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree, shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same upon the making of an appropriation by Congress to pay this judgment.

The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States.

12. *United States Objects.*

From this final decree the United States, represented by Hon. Lewis A. Pradt, has appealed, as was expected, because the special acts sending these cases to the court pre-supposed an appeal, and Congress does not wish to appropriate money for this large amount without a decree from this Honorable Court.

Because it is the custom of the counsel for the Government to oppose the payment of money by its officers, especially in large sums, and he is paid to rack his mentality for objections to such payments, even if far fetched, as they have been in this case, referring mostly to the status of the expert accounts, Messrs. Slade and Bender, for having injudiciously arrived at the conclusion that the United States Government was indebt-

ed (as they state it) to "amount paid for removal of *Eastern Cherokees* to the Indian Territory," improperly charged to the treaty fund of $1,111,284.70, with interest thereon at 5 per cent per annum from June 12, 1838, to date of payment," due under the 15th article of the Treaty of 1835; which is the contention in this case. The counsel for the Government further objects, as do we, to the payment of any portion of the sum mentioned in the second item of the award to the Western Cherokees or Old Settlers, otherwise known as the Cherokee Nation, for the reason that their proportion of this fund from which the money was improperly taken, viz.: "one-third part of said residuum" was paid to them and distributed per capita in accordance with Art. 4 of the Sixth Treaty of Washington, as allowed Sept. 30, 1850, and their receipts, as a full discharge of the Government's obligation to them on this account was given therefor, and is on file in the Treasury Department.

13. *The Eastern Cherokees Object.*

From this decision the Eastern Cherokees, represented by Messrs. Owen and Belt, have appealed—objecting to any payment being made to the Western Cherokees alias the Cherokee Nation out of Item 2, for the reason stated above, that they, the Western Cherokees, have already had their share, and are not entitled to participate in this fund, that the indebtedness is one especially due to the Eastern Cherokees as represented by the treaty of 1835-6-8 and of 1846, and that the Cherokee Nation as a body politic or a corporation are now practically defunct, are not entitled either equitably or legally to receive or distribute any portion of this fund, a fact well understood by the rank and file of the Cherokee people, although the principal chief and his advisers at a very late day were constrained to ask for it, and to file their suit herein. Notwithstanding that their agreement with the Government was uncompleted, they not only did not bring suit but they did not assist in the legis-

lation which sent this Congressional claim to the Court of Claims for Findings of Facts, or later sent it back for a judgment, or take any serious interest in the matter until the court had made its findings, sent them to Congress for an appropriation, and Congress had enacted new legislation, sending the case back to the court for final adjudication; and after notification by the Secretary of the Interior, the case having been abandoned by their former attorneys, when the Nation, so called, appears by counsel and claims the whole fund.

14. Counsel for the Eastern and Emigrant Cherokees sustains the Eastern Cherokees in their contention against the United States and as against the Cherokee Nation, and as to the reasons therefor; and their cause and that of the Eastern and Emigrant Cherokees in this regard is virtually one except for the specific proportions of the money claimed, and as to the individuals who are to receive it; the Eastern Cherokees Claiming the whole amount and the Eastern and Emigrant Cherokees claiming only one-fourth of item two of the award, or their pro rata according to their number.

15. *The Eastern and Emigrant Cherokees*

Stand in the same position as the Eastern Cherokees with reference to the status of this fund and its payment, believing that it should be paid entirely to the Eastern and Emigrant Cherokees as individuals per capita as provided by the treaties of 1835-6 and 46, whose lands in North C...olina, orth Georgia, Northern Alabama and Eastern Tennessee, all formerly the Province of North Carolina, were sold to create the Five Million Fund—an interest bearing fund in the hands of the Government, from which the $1,111,284.70 was, as the expert accountants state, "improperly taken."

They believe that the appeal of the government, with the fair mindedness and clear sightedness of this court, when the

facts are fully before them, will do them justice. They were not paid their two thirds of this fund as agreed by the Treaty of 1835, when the old settlers, or Western Cherokees received their one third, which was distributed pro rata. See Opinion of the Court.

16. *The Oklahoma Strip or Outlet West.*

The Eastern and Emigrant Cherokees here represented, received no portion of the eight million five hundred thousand ($8,500,000) dollars, paid to the Cherokee Nation, for the Oklahoma Strip or Outlet West, ceded to the Cherokee people, and their descendants forever; nor have they for the most part been able to receive allotments of the lands in the Indian Territory which is being distributed in severalty to the members of the Cherokee Nation or socalled 'citizens' for the reason that they did not remove West soon enough, or have gone outside of the Territory to make their living—some of them to teach or to preach, and some to go into trades, or to cultivate the soil; and all of them poor—mostly without lands, with moderate means, striving to eke out an existence, and to become worthy citizens of the United States, and to whom their small pro rata of this award would be a partial compensation for their entire loss of land in the Indian Territory, their attempts at thrift working against them by the Act of the National Council.

17. *What are the facts?*

There is no longer any Cherokee Nation. Congress on the 3rd of March, 1901, and before the filing of this suit, wiped out the Cherokee Nation and all of the tribal relations of the five civilized tribes of Indians in the Indian Territory by determining that it should go into liquidation Mar. 4, 1906. The Cherokees themselves, by act of their National Council, voted to abolish their tribal relations Mar. 30, 1906.

Public No. 173.

"An act to amend Section 6, Chapter 119, *United States Statutes-at-Large*, No. 24, p. 390: Be it enacted by the Senate and House of Representatives, U. S. A. etc.,

"That Section 6, of Chapter 119 of the United States Statutes-at- Large, No. 24, page 390, is hereby amended as follows, to wit: After the words 'civilized life,' in line 13 of said Section 6, insert the words 'and every Indian in Indian Territory.' Approved March 3, 1901."

Section 6, Chapter 119, U. S. S. No. 24, page 390, February 8, 1887, to which these amendments apply, reads: "That upon the completion of said allottees, each and every member of the respective bands or tribes to whom allotments have been made, shall have the benefit of, and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without, in any manner impairing, or otherwise affecting the right of any such Indian to tribal or other property."

Thus it will be seen that Section 2,103 of the United States Revised Statutes, p. 37, with reference to contracts with Indians, is repealed by implication, and any civilized Indian or

Indians, may contract, sue, or be sued, the same as any white citizen.

But the indebtedness sued for here is based upon the treaty of 1835. That treaty was modified by "The Sixth Treaty of Washington," proclaimed Aug. 17, 1846. The last half of Article 7, of this treaty, pages 104-5, T. B., states: "All the investments and expenditures which are properly chargeable upon the sums granted in the Treaty of 1835, amounting in the whole to $5,600,000 (which investments and expenditures are particularly enumerated in the 15th Article of the Treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum, or amount which would, under such marshaling of accounts, be left for per capita distribution among the Cherokees emigrating under the Treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to *one-third* (1-3) *part of said residuum* to be distributed per capita to each individual of said party of "Old Settlers," or "Western Cherokees. (Paid Sept. 30, 1850.) That the principal above defined shall embrace all of those Cherokees west of the Mississippi River who emigrated prior to the Treaty of 1835." Here we have nothing to be distributed to the Western Nation, so called, or the people who formerly composed it, calling themselves now the Cherokee Nation in distinction from the Eastern and Emigrant Cherokees. This amount is also found by counsel for the Government in his original brief p. 9.

18. *Why In This Appeal?*

a. The Eastern and Emigrant Cherokees are in this Appeal, first, by reason of their independent suit, No. 23,212, brought in the Court below, not as a Nation or a Band, but as individuals or families by their individual or family powers of attorney duly executed, with a history of their Cherokee origin, and numbering about 6,000 persons, the scale ascending as the

parties have petitioned to come in, having numbered in the first suit only about two thousand persons.

b. They are in this Appeal because the United States in its Appeal and contention on the only point at issue—the manner of payment of item 2, have brought them here.

c. They are in this Appeal because of their Intervention in Suit No. 23,199 of the Court below, in which they claimed their one-fourth share of the fund included in item 2, and "The Nation," with consummate modesty, claimed the whole award, while they only number about one-third of the Cherokee people.

d. They are in this suit because their contention and claim is embodied in Suit No. 23,214, in which they, the Eastern Cherokees, claim the whole of item two with the interest thereon, and they have Intervened in Suit No. 23,212 whose members only claim their one-fourth, or pro rata share, according to their numbers; and because all of these suits by motion of the Eastern and Emigrant Cherokees, and by motion of the United States as embodying the same subject matter, were by order of the Court below consolidated and heard together as one suit; and the decision in that consolidated suit is the Decree here appealed from,—or only that portion embodied in item two, and not on account of the amount involved for that is an agreed fact, but to whom shall it be paid? The Eastern and Emigrant Cherokees ask for one-fourth of Item Two to be distributed to them as individuals or as families.

19. *The Cherokee Nation Objects.*

The Cherokee Nation, represented by its counsel, Edgar Smith, Frederic D. McKenney, and others, having received the judgment of the Court in their favor as far as it was possible in all conscience for the court to make it, now "want the earth" as well as the money, and appeal from the decision of the Court below, because it does not allow them to distribute the money contemplated in item two, instead of the Secretary of the In-

terior, who is the proper custodian of this fund, and in face of the fact that the law forbids them to distribute it, or any other Indian funds.

20. The Cherokee Nation could not receive this money for distribution under any equitable decision of the Court, nor in any capacity except as trustee of the fund; and it stands in no sense in the relation of Trustee to the Cherokees in North Carolina, Georgia, Alabama and Tennessee, or in Missouri and Arkansas, nor could the terms of the treaty be fulfilled in that way, and the United States be discharged of its obligation. The Treaty of 1835-6 upon which the money in item two is based read as follows:

Art. 9. "The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of the 29th of December, 1835, which said settlement shall exhibit all money properly expended under said Treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal and subsistence, and commutation therefor, debts, and claims upon the Cherokee nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty, to be invested as the general fund of the nation; and all sums which may be hereafter properly allowed and paid under the provisions of the Treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over per capita, in equal amounts, to all those individuals, *heads of families, or their legal representatives*, entitled to receive the same under the Treaty of 1825, and the supplement of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto."

Art. 10. "It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States East of the Mississippi River had, or may have had, under the treaty of 1835, or the supplement thereto."

21. It will be seen by the above articles that this money when paid must, in order to comply with the Treaty of 1835, be paid either per stirpes or per capita, and so Mr. Gorman, the government counsel, declared in his first brief, but per capita we hope.

The second item of the report, belongs exclusively to the Eastern and Emigrant Cherokees, and as tersely told in that report, this amount was "improperly charged to the Treaty Fund," said Treaty Fund being an interest bearing Fund held by the United States as trustee for the Eastern and Emigrant Cherokees, and created by the sale of Cherokee lands in North Carolina, North Georgia, Northern Alabama and Eastern Tennessee, said lands belonging to those individual Cherokees, whose names, or those of whose ancestors appear on the census roll of 1835, and 1836, some of whom still remain in those sections of the country,—many on reservations, and a larger number who have gone West, to the Indian Territory, but whose names are enumerated herein, identity given, and genealogy proven.

22. *The Cherokee Nation*

Has no longer any existence except in name. It has been emasculated of all power; cannot establish courts or make laws for its people, and though claiming this fund, by virtue of the agreement is forbidden by statute from receiving it.

The Act of June 28, 1898, (Curtis Act,) reads, Sec. 19 (30 U. S., Stat. p. 495):—

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments, or any officer thereof, for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior, by an officer appointed by him; and, per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previous-

ly contracted obligation."

So it will be seen that the Nation, so-called, cannot receive and disburse this money even as trustee, and is neither equitably or legally entitled to receive it.

23. Opinion of the Court (Ninth page).

We cannot do better here than to quote the opinion of the Court below, who after the most careful and painstaking research, and hearing of lengthy arguments, has delivered among other things the following:—

"The present case is also complicated by the fact that a considerable portion of these communal owners are neither citizens of the Cherokee Nation nor subject to its jurisdiction nor dwellers within its territory, but are and always have been residents of territory east of the Mississippi, owing allegiance now exclusively to the United States. It is also complicated by the fact that the account rendered by the United States to the Cherokee Nation is made up of four distinct and essentially different items: One, the chief one, is for money erroneously charged to the Cherokees instead of being divided *per capita* among them; another is for money which should have been added to the principal of the school fund, a fund which is held by the United States in trust; a third is for money improperly charged to the Cherokee national fund, likewise held in trust by the United States. Only one appears to be money properly due to the Cherokee Nation as a government, and that for the inconsiderable amount of $432.28. The case is further complicated by the fact that the government of the Cherokee Nation is passing away; that it has already ceased to possess a judiciary, and that on the 4th of March, 1906, it will, to all intents and purposes, expire.

"The action instituted in this court by the Cherokee Nation was properly an action at law to recover a liquidated amount of money upon an express contract. But the act of 1st July, 1902 (32 Stat. L., p. 716, 68), under which it was instituted, authorized the court to adjudicate any claim which the Cherokee Nation "or any band thereof" might have against the United States, with "full authority by proper orders and

process to make parties to any such suit *all persons whose presence in the litigation it may deem necessary or proper* to the final determination of the matter in controversy" The supplemental act 3rd March, 1903 (32 Stat. L., p. 996), expressly authorized "the Eastern Cherokees, so-called, including those in the Cherokee Nation and those who remained east of the Mississippi River," to come in and prosecute their claims, with power to the court "also to determine as between the different claimants, to whom the judgment so rendered equitably belongs." The case, then, being that of many persons severally interested in a common fund, is one of which equity takes jurisdiction; and the several suits merged by interpleader into one have become a suit in equity.

"While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case the negotiations have been with representatives of the owners. The chiefs and headmen have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate; and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf but allowing them to receive the consideration per capita. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and headmen of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their Government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the Treaty of 1835, were equally interested, with the communal owners who were carried to the west, in the $5,000,000 fund which was the consideration of the

cession, so far as it was to be distributed per capita. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund; but their rights were inextricably woven with the rights and equities of the Cherokees, who were citizens of the nation; and the nation properly made no distinction when parting with the Outlet, but demanded justice, from the Cherokee point of view, for all Cherokees who had been wronged by the nonfulfillment of the Treaty of New Echota. As to these Eastern nonresident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the money would be an implied trust for the benefit of the equitable owners.

"After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners. A great change has come within a few years both as to the powers and the responsibilities of the Cherokee Nation. Its statute went to the full extent of the civil law in making the Government liable to all persons being citizens of the nation: "The Cherokee Nation shall be liable to all persons whatever, citizens of the nation, having claims at law or equity against her, to the same extent as individual persons are liable to each other, and may be sued by any citizen having a cause of action." (Code 1874, p. 240, Sec. 130.)

"But the judiciary has ceased to exist, and, as has before been said, the nation itself as a government will cease to exist. "The constitution of the Cherokees was a wonderful adaptation to the circumstances and conditions of the time, and to a civilization that was yet to come. It was framed and adopted by a people, some of whom were still in the savage state and the better portion of whom had just entered upon that stage of civilization which is characterized by industrial pursuits, and it was framed during a period of extraordinary turmoil and civil discord, when the greater part of the Cherokee people had just been driven by military force from their mountains and valleys in Georgia, and been brought by enforced immigration into the country of the Western Cherokees; when a condition of anarchy and civil war reigned in the Territory—a condition which was to continue until the two branches of the nation should be united under the Treaty of 1846 (27 C. Cls. R., 1); yet for

more than half a century it has met the requirements of a race steadily advancing in prosperity and education and enlightenment so well that it has needed, so far as they are concerned, no material alteration or amendment, and deserves to be classed among the few great works of intelligent statesmanship which outlive their own time and continue through succeeding generations to assure the rights and guide the destinies of men. And it is not the least of the successes of the constitution of the Cherokees that the judiciary of another nation are able, with entire confidence in the clearness and wisdom of its provisions, to administer it for the protection of Cherokee citizens and the maintenance of their personal and political rights." (*Journeycake* v. *Cherokee Nation*, 28 C. Cls. R., 281, 317.)

"Since those words were written a hopeless development has taken place in the affairs of this people. It has been with them as it has been with other nations—as it has been with families and individuals—to rise in the times of their tribulation, but to sink under the enervating blessings of prosperity."

24.

This should not be deplored by any party, as it is for the betterment of the Indians, and a complete evolution from their former condition. After the lapse of more than four hundred years, this unassimilative people are to take their places as citizens of this great Republic. The Court says further: —

"In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person which should not be intrusted with the receipt and distribution of the moneys belonging to other persons.

"The persons to whom distribution of this fund of $1,111,284.70 with accrued interest would be made if they were now living would be the communal owners of the Cherokee lands east of the Mississippi. By the tripartite treaty of 1846 the western and the eastern Cherokees were placed on the same footing with regard to all lands east of the Mississippi and with regard to the funds derived from them. It follows, necessarily, that each and all of the present owners, whether on the east or

the west of the Mississippi, and whether the descendants of eastern or western Cherokees, have the same individual interest in the fund and will be entitled to like amount per capita."

25. Take Issue With the Court.

It is at this point that we take issue with the court below. The reasoning is good as to communal ownership, the treaty of 1846, etc., and was undoubtedly true and fair at the date of the treaty and up to the time when the Western Cherokees received their pro rata of the fund, and gave their receipts therefor. We cannot now see, after this payment to the Western Cherokees, or Old Settlers, and after they have kept all of the western lands and proceeds of sale of the Oklahoma Strip for their own use and benefit, that either the Nation, the Western Cherokees, or their attorneys should participate in the balance of this last distribution of communal property belonging to the Eastern and Emigrant Cherokees, as their share.

26.

If, as the court states, the Nation as such, has not status enough, to be intrusted with the distribution of this money, why should their attorneys be permitted to collect the per cent. which the counsel for the Eastern Cherokees have so honestly earned in this cause by securing the legislation of the two special acts, and other matters that have sent this claim to the court for adjudication, through which they have carried it, and have finally brought it here on appeal, and thus deprive them of their fee, or compel the Cherokees to pay a double fee out of the small stipend that will form their pro rata, simply because the Cherokees asked and the United States agreed that all unsettled accounts between the Government and the Cherokees under any of the treaties enumerated should be adjusted, and that if it was found that the Government owed them anything it should be promptly paid.

27. The Liability of the Government to Pay the Award.

I feel obliged to use this term because to me, notwithstanding the protest of the Government counsel, and the words of the court, it does not mean anything else, and was "made in accordance with the provisions and the requirements of the submission."

The Attorney-General says with regard to the Slade-Bender Report, that it is the work of mere clerks—that they were without legal authority, or legal ability to draw any conclusions about this matter, although they were selected by the Secretary of the Interior under the authority of an Act of Congress, not only on account of their ability as expert accountants, but on account of their knowledge of Cherokee Indian affairs, and because they were dealing exclusively with such matters. He denies that it is an award but reluctantly admits that it may be an account stated. That Slade and Bender, if they could do nothing else could make up a correct account. We believe it to be an award as binding as the judgment of a court; and as a part payment for the Oklahoma Strip embodied in the so-called "agreement," which the Government ratified by paying over to the Cherokee Nation the $8,500,000, promised at the same time, and the taking possession of the Oklahoma Strip; thus pledging the faith of the United States to complete the whole agreement, and abide by the decision of the referees.

Justice Weldon in commenting on this aspect of the case states: (See opinion of the Court.)

"The consideration therefore consist of different elements of inducements, and in law those elements constitute and form the basis upon which the agreement rests, and none can be eliminated without the destruction of the entire force of the agreement.

"The consideration though in parts and sections is a unit, and to disturb or eliminate one element is to destroy the whole. The consideration is the basis of the contract, and without its

preservation as a whole the contract fails.

"The court must therefore assume that without all of the considerations the Cherokee Nation would not have released to the United States a district of country large enough to be one of the States of the Union."

No person has questioned the accuracy of the accounting. The Cherokee Nation accepted it on behalf of the Cherokee people; the Secretary of the Interior accepted it on behalf of the Government (see letter of Hoke Smith, Jan. 7, 1895) and again on the call of the Eastern and Emigrant Cherokees No. 23,212, in the Court of Claims, May 15, 1905, states:

28. Report of Secretary of Interior.

Permit me to report:

"An examination of the records of this office has been made as to whether they contained any documents or letters which would throw any additional light on the questions involved in the suit above in the Court of Claims, and it has been ascertained that the records of this office have been thoroughly searched heretofore, and all matters of record or otherwise, in this office which would in any wise tend to support the contention of either party have already been incorporated in the official reports which have hitherto been published by Messrs Slade and Bender which culminated in their well known report, every letter and document in this office were carefully scrutinized, and were partially the basis of that report.* * * There appears to be nothing left except questions of law which are peculiarly in the province of the Treasury Department.

29.

Statement. TREASURY DEPARTMENT.
Office of Auditor for the Interior Department.
Washington, D. C., March 19, 1903.

The Comptroller of the Treasury.

SIR: I return herewith the request of the Hon. L. A. Pradt,

Assistant Attorney-General, for information in the case of the Cherokee Nation *vs.* The United States, in the Court of Claims, No. 23,199, referred to this Office March 18, 1903, for report, with the following information:

The Act of March 3, 1893 (27 Stat. 643) appropriated $5,000 to enable the Commissioner of Indian Affairs under the direction of the Secretary of the Interior, to employ expert persons to render a complete account of moneys due the Cherokee Nation. Said account was rendered by Messrs. Jas. A. Slade and Joseph T. Bender, April 28, 1894, and was transmitted to the Speaker of the House of Representatives by the Secretary of the Interior, Jan. 7, 1895. See Ex. Doc. 182, 53rd Cong. 3rd sess.

It is believed that said account embodies all of the information touching the above entitled cause, that can be obtained from the files of this office. Respectfully,

(Signed) R. A. PERSON,
Auditor.

The United States had the money, the books, and the vouchers, and employed their own accountants, who on April 12, 1894, declared that the United States had improperly taken from the Five Million Fund, an interest bearing fund in the hands of the Government, $1,111,284.70, and that this amount was due to them, together with interest at 5 per cent. per annum from June 12, 1838 to date of payment. The Court of Claims repeated this in its Findings May 2, 1902, and rendered a Judgment for that amount on May 18, 1905.

30. *Liability for the Interest.*

This is a case in which the principal and interest seem to be inseparably connected, because it is provided for in the Treaties of 1835-6 and 1846. See also report of Senate Committee.

"The treaty of 1846 expressly pledged to the Cherokees a fair and just settlement of the moneys due them under the treaty of 1835, and that only sums properly chargeable against them should be entered as a charge against the trust fund.

Notwithstanding this agreement to make a fair and just settlement which was obligatory upon the United States, independently of the treaty of 1846, the accounting officers of the Treasury did in fact take from the $5,000,000 trust fund, for the expenses of removal, the sum of $1,111,284.70. This sum should have been found due to the Cherokees when the settlement was made with them in 1851, and should have been paid to them with interest at 5 per cent. per annum from June 12, 1838, until paid.

"Interest was found due the Cherokees on this sum by the Interior Department in its award of April 28, 1894, for the following reasons: First, that this fund was taken from the trust fund, which, under the general statute, bore interest at 5 per cent.; second, because by the eleventh article of the treaty of 1846 the United States agreed to leave the question of interest to the decision of the United States Senate, and the Senate of the United States, on the 5th of September, 1850, acting as umpire, passed the following resolution:

"*Resolved*, That it is the sense of the Senate that interest at the rate of 5 per centum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid."

"Congress ratified this decision of the Senate of the United States in various acts, to wit.: On September 30, 1850, in making settlement with the Eastern Cherokees on that date (9 Stat. L., 556); on September 30, 1850, in an appropriation to the Western Cherokees (9 Stat. L., 556); on February 27, 1851, in an appropriation to the Eastern Cherokees (9 Stat. L., 572); on February 27, 1851, in making the appropriation to the Western Cherokees (9 Stat L., 572); on August 24, 1894, in making the appropriation to the Western Cherokees (28 Stat. L., 451); on March 3, 1809, in making the appropriation to the Western Cherokees (30 Stat. L., 1235). The Supreme Court of the United States had occasion to pass upon the scope of the

Senate resolution of September 5, 1850, in regard to interest, in the case of the Western Cherokees against the United States. The court said:

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed, at the rate of five per centum per annum upon the sum found due the Western Cherokees, from June 12, 1838, until paid."

The Attorney-General, in dealing with matters of interest in this case, states as follows in part:

31. *The Attorney-General.*

"The claim for interest in this action, which amounts to about three and one-third times the principal, or the sum of $3,700,000, in round numbers, is based upon the authority of the *United States* v. *Old Settlers*, 148 U. S., 427. The decision relied upon is based upon the resolution of the United States Senate as umpire, adopted September 5, 1850, deciding that interest should be allowed at the rate of 5 per cent per annum on the sums found due the Eastern and the Western Cherokees, respectively, from June 12, 1838, until paid. This resolution was made pursuant to Article II of the Treaty of 1846, which provided for leaving to the Senate "the question whether the Cherokees shall be allowed interest on whatever sum may be found due the Nation and from what date and at what rate per annum." The method of ascertaining the sum due the Nation thus referred to is prescribed in section 9 of the same treaty, wherein the United States "agree to make a fair and just settlement of all moneys due to the Cherokees." * * *

"And thereupon, having determined the actual amount due the Western Cherokees which should have been found in the accounting under consideration, the court went on to say, on the question of interest: ••

"But in this case, the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect. * * *

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling." (Page 478.) * * *

From this point the Attorney-General dissents.

32. Parties Agreed.

The United States has not appealed from the amount of the Findings of the court.

But so far as appears the United States has not appealed from the judgment of the court in either the amount of the principal or the interest, so that an elaborate discussion on that ground is not necessary. We are agreed that $1,111,274.70 is due to the Cherokees with interest from June 12, 1838, or the time when the five million fund was depleted.

The Eastern Cherokees and the Eastern and Emigrant Cherokees, and the United States are agreed that this fund shall be paid in accordance with the 9th article of the Sixth Treaty of Washington or the Treaty of August 17, 1846, the latter portion of which reads as follows:

"The aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the Treaty of 1835,

and the supplement thereto."

33.

"Art. 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees, now residing in States east of the Mississippi River had, or may have, under the Treaty of 1835, or the supplement thereto."

"Art. 12, Treaty of 1835. Those individuals and families of the Cherokee Nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirious to become citizens of the States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and per capita, as soon as an appropriation is made for this treaty.

34.

"Such heads of Cherokee families as are desirious *to reside* within the States of North Carolina, Tennessee, and Alabama, subject to the laws of the same, and who are qualificd or calculated to become useful citizens, shall be entitled on the certificate of the commissioners to a pre-emption right to one-quarter section at the minimum Congress price, etc., etc." The Cherokees were not allowed at that time to pre-empt lands in Georgia, whose State Government and individual citizens had been very influential in driving the Cherokees out of the State, from whom, by the Treaty of New Echota they had received a large tract of valuable land, located in north Georgia. Notwithstanding this, there are still many Cherokees and their descendants in north Georgia, as we shall show.

35. *Cannot be Relieved from its Obligation.*

Justice Nott in his opinion says:

"When the account was thus received by the Cherokee Nation (May 21, 1894) the 'twelve months' of the agreement, within which the Nation must consider it and enter suit against the other party in the Court of Claims, began to run; and with the Nation's acceptance of the account (December 1, 1894), the session of Congress at which an appropriation should be made became fixed and certain. The Secretary did not recall the account; the United States never rendered another; and the utmost authority which Congress could have exercised, if any, was, at the same session, or certainly within the prescribed 'twelve months,' to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament; and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement."

It would therefore seem that the United States cannot be either legally or equitably relieved from its obligation to the Cherokee people unless this fund is distributed individually and per capita to the families or persons entitled to receive it, whether in North Carolina, Georgia, Alabama, or Tennessee; or in Missouri, Arkansas, or the Indian Territory, or elsewhere, the same being those persons who have not yet received their per capita. This idea was also suggested by Mr. Gorman, attorney for the United States, in his first Brief to the Court of Claims. To carry out this idea the court below bery properly

suggests that new rolls be made as follows: p. 12, of Opinion of the Court, March 20, 1905:

"That the amount of $1,111,284.70, together with interest thereon from June 12, 1838, to a day when the Secretary of the Interior shall be ready to make payments, as hereinafter provided, nevertheless be paid directly to communal owners being Cherokees by blood, whether on the eastern or western side of the Mississippi River. And to that end the Secretary of the Interior is authorized to appoint one or more commissioners to proceed to the Cherokee country and to the country of the Cherokees residing east of the Mississippi to ascertain and report to the Secretary the facts necessary for the formation of rolls of all Cherokees by blood, the expenses of making out and preparing such rolls to be a charge upon and paid out of the fund awarded by the decree.

"The decree will also provide for the payment of the fund to the parties per capita, the charge of distribution likewise to be a charge upon the fund."

37. *Who are the Eastern and Emigrant Cherokees.*

At the date of the Treaty of 1835-6~~2~~, 1846 when the subject matter of this suit originated the Cherokees East were the Nation, and were long known as the Eastern Cherokee Nation.

At the date of the Treaty of New Echota, Dec. 29, 1835, several thousand Cherokees had already removed to what is now known as the Indian Territory. To distinguish them from the Cherokees who remained in the Eastern States they were commonly called the Western Cherokees. After the removal of the Cherokee Nation to the Indian Territory, this name was no longer distinctive, and those Cherokees who had been known as Western Cherokees were thereafter known as "Old Settlers."

The Cherokees who removed to the Indian Territory after the signing of the Treaty of Dec. 29, 1835, as well as those who remained permanently east of the Mississippi, were thereafter

known as Eastern Cherokees, and the descendants of the latter who removed, as Eastern or Emigrant Cherokees, or as forming one body with those who remained east.

38. *The Number.*

Of the last named who form the third division of this tripartate suit ~~No. 189,~~ there are now 6,000 Cherokees whose family powers of attorney, ages, and genealogy are filed in this suit, and who claim to represent fully one-fourth of that portion of the Cherokee people known as Eastern Cherokees, and among whom the fund in dispute in this cause should be divided pro rata. The special legislation by which these cases were permitted to be brought in the Court of Claims was secured by the Eastern Cherokees. It is their suit.

Peele, J., in the Opinion of the Court below, of March 20, 1905, p. 27, states as follows:

"Under the amended section the Eastern Cherokees appeared by counsel and filed their petition, claiming that they were entitled to the amount stated in the account so rendered under the direction of the Secretary of the Interior for the cost of their removal to the Indian Territory, with interest thereon at 5 per centum from June 12, 1838. Still another class, known as Eastern and Emigrant Cherokees, appeared by counsel and filed their petition, in which they claimed one-fourth of the amount stated as the cost of removal of the Eastern Cherokees to the Indian Territory. Therefore, the Cherokee Nation, as well as the Eastern and all other Cherokees claiming any interest in the subject-matter of the litigation, appear to be in court as required by the jurisdictional act."

39. *To Whom the Item No. 2 of the Award Belongs.*

As stated, it belongs exclusively to the Eastern and to the Eastern and Emigrant Cherokees. The Five Million Fund

from which the item of $1,111,284.70 was taken was created by the sale of the lands of the Eastern Cherokees in North Carolina, Georgia, Alabama, and eastern Tennessee. It was made a trust fund, an interest bearing fund at 5 per cent per annum in the hands of the Government. The treaty states who these people are. They are those Cherokees whose names or those of whose ancestors are on the roll of 1835-6-8, or the Treaty of 1846, "the Cherokee Nation East according to the census just completed, and such Cherokees as have moved west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees East."

40. *Do Not Wish it Paid to the Cherokee Nation.*

It is the very urgent desire of the Eastern and Emigrant Cherokees that this money be not paid to the Cherokee Nation, even as a trustee, for other reasons than those named by the court; for in that event, not a dollar of it would be paid to the Cherokees in North Carolina, north Georgia, northern Alabama and eastern Tennessee, nor in Missouri and Arkansas, nor to a large number of Eastern Cherokees in the Indian Territory, of undoubted Cherokee blood who have not been enrolled by the Commission of the Five Civilized Tribes, and admitted to citizenship, although their applications have been duly filed for enrollment, are of Cherokee blood, and proofs furnished, on account of objections filed by the principal Chief and his subordinates, or some arbitrary provision of the council who have found that these persons did not remove to the Territory in due time, or have not permanently abided there, or have found occupation outside of the Territory, and in this way many families have been divided by some of them securing enrollment, while other members have been denied it.

41.

In the distribution of the $8,500,000 for the sale of the Outlet, or Oklahoma strip, the Eastern and Emigrant Cherokees received nothing. In the distribution of the tribal land in the Indian Territory, the Eastern and Emigrant Cherokees whom I represent, as a rule will receive nothing, because they are not on the enrollment. In the distribution of the money from former sales of Western lands they received nothing, although a suit was brought by the Eastern or North Carolina Cherokees in the Court of Claims vs. the Cherokee Nation of Indians in March 7, 1883, known as No. 13,606, to recover their share in which the court decided that they could not recover because they had not removed west, and taken up their homes with the Nation, and therefore had no common rights, but even that procedure has failed to give them citizenship since it became known that the lands in the Indian Territory were to be distributed.

42

But this fund belongs to them, exclusively as we think, by all the laws of descent known to our jurisprudence. They are individual citizens of this great Republic, who have adopted in the words of the law, "the habits of civilized life, and are entitled to all of the rights, privileges, and immunities of citizenship; without affecting their right to tribal property." See Act of March 1, 1901.

43.

Justice Nott, who listened with infinite patience and interest to all of the manifold details of the various branches of this case, was right in calling it a suit in *Equity* (and in this he was seconded by Justices Weldon and Peele), and, by including all of the parties in interest in this decree, which must be forever memorable, whatever may be the action of this court.

44. *Eastern and Emigrant Cherokees Poor.*

The Eastern and Emigrant Cherokees are poor, the large majority of them are without land. About 2,000 of them are located on what is known as the Qualla Boundary in the northwest portion of North Carolina, where they have a communal interest, which is now in the hands of, and controlled by a corporation, by a deed from the Government. If any Cherokee moves off from this reservation and ventures to return, he is called a trespasser. A number of such trespassers have appealed to me to protect their interest, but they have no redress except to be recognized by the corporation.

The distribution of this one-fourth interest pro rata by the Secretary of the Interior into these poor homes will carry light, hope and comfort to many a cheerless hearthstone. They are a frugal and industrious people.

45. *The People of the Western Nation*

are rich. Their fathers, mothers and every child born before September, 1902, have their allotment of land. They had their share of the "Strip" money. They will participate in the tribal funds still in the hands of the Government. Why should they take this sum out of our hands for distribution by the Nation simply because the so-called agreement was made with the Nation? It had to be made with somebody. The Government wanted the land, and it had to get hold of somebody who had a corporate existence and a legal entity to make the transfer, and it took the so-called Cherokee Nation and we must abide by it. It is probably the last claim which the Eastern and Emigrant Cherokees will have against the United States.

46. *Have Abolished the Nation.*

Having wiped out the Cherokee Strip that had been given to the Cherokees as a perpetual outlet to the sea, which was to en-

dure to the end of time, Congress proceeded to wipe out the Cherokee Nation, and has from time to time, and from year to year limited its duties—emasculated it—giving to the Indians increased individual powers, until the Commission of the Five Civilized Tribes announced that it would complete the allotments by June 30, 1905. I do not think that it has yet been fully completed, but whenever this is done, the supervisory duties of the so-called Nation will expire. They have themselves in National Council assembled agreed to a dissolution of their tribal powers on March 4, 1906. That time will arrive before the new rolls are made, and the money contemplated in this suit will be paid. We have not for obvious reasons, chosen the Cherokee Nation as our trustee, but we do not object to the Secretary of the Interior.

47. *The Parties Claiming.*

As to the parties claiming in Suit No. 347, the Eastern Cherokees, we have no controversy. We are working practically for the same end, and pretty much the same way, but we do not wish the court to appropriate to them the entire fund, contained in Item 2 of the award, or to control the distribution of the fund which should properly belong to the 6,000 Eastern and Emigrant Cherokees by actual count represenleed in cause by ~~us~~ or the appellees.

48. *The Probable number of Eastern Cherokees.*

We are not able to sum up by any census found, or any reliable estimate made, a larger number of Eastern Cherokees who would be entitled to their pro rata of this fund than 22,500 at the most, including our own representation.

49.

There are two points that should be approximately if not definitely settled by the court, viz.:

1. The probable number of persons entitled to participate in the fund?

2. The degree of consanguinity necessary for enrollment?

3. Whether the money shall be paid to individuals or to families? It would be a difficult thing to attempt to pay a large number of minor children.

50. *Prayer.*

Your complainants, therefore, request upon the facts shown, as follows: That if the court should determine that the Cherokee Nation are, as they claim, the proper custodians of this fund, that then the proportionate share of the Eastern and Emigrant Cherokees to the fund be set aside for them, independently to be distributed by the Secretary of the Interior, in accordance with their numbers.

But if your Honors shall decide, as we expect you will, that the principal part of the fund known as Item No. 2, belongs to the Eastern Cherokees, and the Eastern and Emigrant Cherokees, then we ask and expect that one-fourth part, in proportion to our numbers, or $277,821.18 1-2 of the whole sum, with interest thereon from June 12, 1838, be set apart for the Eastern and Emigrant Cherokees, as their distributive share. . .

BELVA A. LOCKWOOD.
Attorney for Eastern and Emigrant Cherokees.

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JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States

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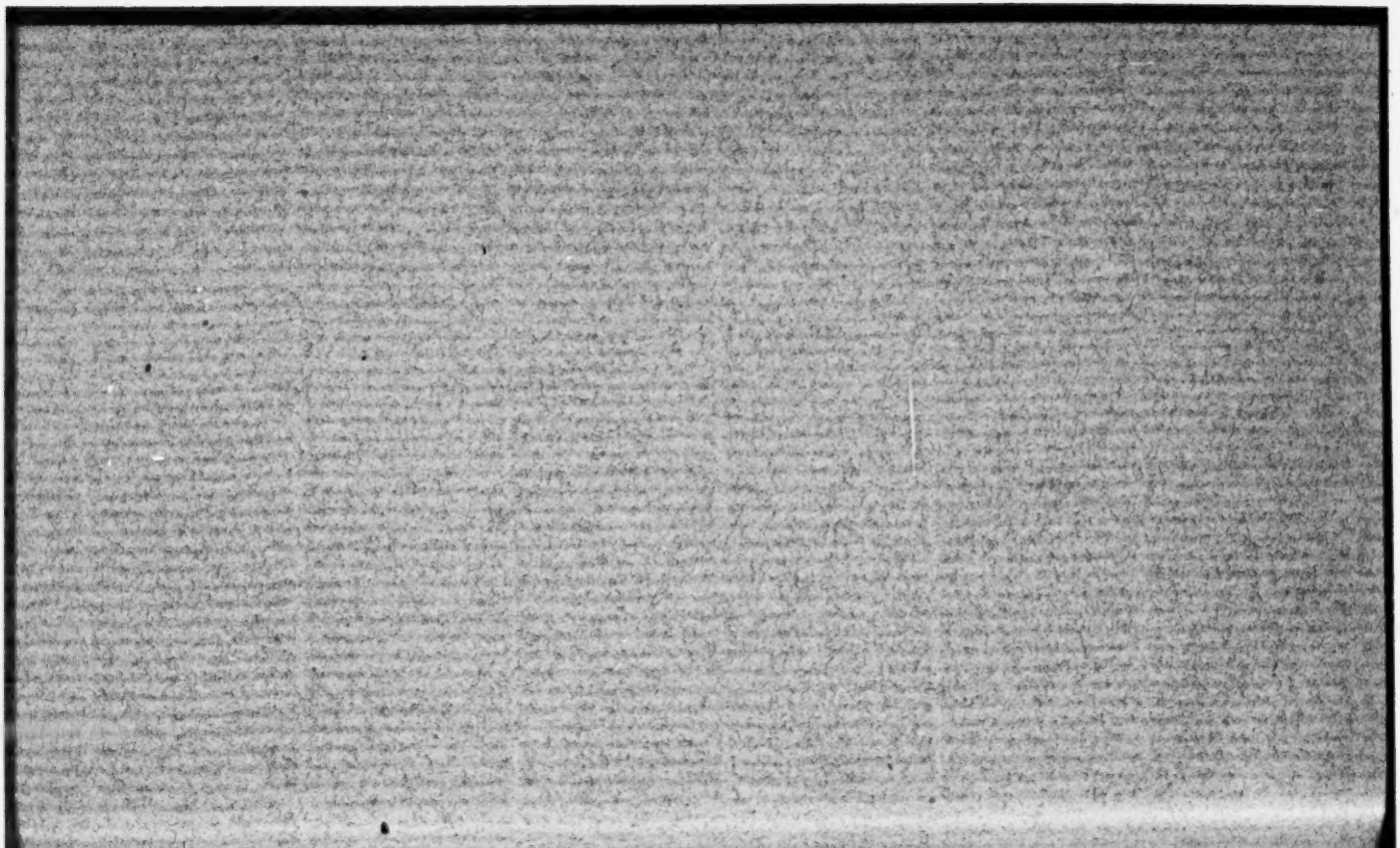
Appeals from the Court of Claims

REPLY BRIEF

For the Eastern and Emigrant Cherokees

APPELLEES.

BELVA A. LOCKWOOD, *Counsel*,
619 F Street, N. W., WASHINGTON, D. C.



IN THE

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APPELLEES.

1. In replying briefly to the very learned and elaborate argument of the attorney for the Government, counsel for the Eastern and Emigrant Cherokees begs leave to state that while this case is not strictly *res judicata,* not being the finding of a Court, it is virtually, and, should be so considered, as *an award under a treaty.*

2. The United States made its own agreement with the Cherokees for the sale of the Oklahoma Strip, one of the conditions of which was, to pay them, the Cherokees, all outstanding obligations between them. The United States appointed their own Commission, used their own books, receipts and vouchers, and this Commission among other things, found that there was due for the removal of the Eastern Cherokees $1,111,284.70, with interest at 5 per cent per annum, from June 12, 1838 until paid. This account was accepted by the Cherokee Nation, and by the United States; not denied by the Secretary of the Treasury, who said he had nothing to add to the account; was approved by the then Secretary of the Interior, Hoke Smith, and reported to Congress for an appropriation.

3. It would seem that after this procedure that the United States are concluded by the findings of their duly appointed Commissioners, and by the law of good conscience and fair dealing, sanctioned by the United States Supreme Court in the Arredondo case, 6 Peter, p. 691.

4. As to the claim of the Western Cherokee Nation, that this money if paid belongs to them; this could only be true as constructive trustees of the fund under the agreement, as the Western Cherokees, or the Cherokee Nation, so called, were paid their one-third share of the fund, as provided by the treaty of 1835, Sept. 30, 1850, and the remaining balance in 1894, Aug. 23rd, and therefore can have no lien on this award, which belongs as distinctly set forth, to the Eastern Chero-

kees for the sale of their lands in North Carolina, Georgia and Tennessee, and as the Nation and its government will expire on the 4th of March, 1906, both dejure and de facto, it cannot be paid to them.

5. This money when paid will go into the homes of thousands of poor farmers where a few dollars for tools and subsistence will do a great amount of good, and must be paid per capita or per stirpes.

I have personal knowledge of these people, having visited them in their homes, and represent about six thousand of them by individual or family powers of attorney as provided in the treaty, which are executed and filed in this cause

Notwithstanding that the Treaty of 1846 Art. 1, provided that "the lands occupied by the Cherokee Nation shall be secured to the whole people, and a patent shall be issued to them by the United States," no portion of the money paid for the many sales of this land by the Western Nation or Old Settlers, has ever been paid to the Eastern and Emigrant Cherokees nor have they been allowed to any great extent during the last decade to settle on lands in the Indian Territory, and to receive their allotments from the Cherokee Nation, who have excluded them for purposes of their own, but principally because it would reduce their pro rata. The various sales of Cherokee lands West by the Nation, amounted Sept. 13, 1882, to $8,070,571.70, and the sale of the Cherokee Outlet to $8,600, or a total of $16,670,571.70, all of which has been paid

to the Cherokee Nation, or Old Settlers, and distributed to its members, and not any portion of it, with a few exceptions, to the Eastern and Emigrant Cherokees, so called. Among these are what is known as the Pride Roll, consisting of 536 persons, who tried to remove under the auspices of J. A. Pride from North Carolina, July 23, 1896, but no money could be obtained to remove them on application, and a roll of 858 persons who removed themselves at their own expense in 1858, who have not been repaid. The balance of the 6,000 persons are those still remaining in North Carolina, North Georgia, and Eastern Tennessee, and those of their children who have gone West to the Indian Territory, with a few in Missouri and Oklahoma who have not been incorporated in the Cherokee Nation, and have not received its benefits.

6. The argument put forth that the Slade Bender account rendered is not an award because rendered by the debtor, and not by the creditor, has the unusual aspect that the fund of $5,000,000 for the sale of lands in North Carolina and Georgia, that the books, accounts, receipts and vouchers were all in the hands of the debtor, and the creditor was at his mercy and could not well have rendered the account.

Counsel for the Government not only attacks Slade and Bender for their report, honestly rendered, but the Secretary of the Interior for the ratification of that report, and sending it to Congress, and by implication the Secretary of the Treas-

ury, who acquiesced in the report, and said when called upon through the Court, that he had nothing to add to it.

7. I do not understand the agreement, as do the counsel for the Government and the Court below, that the award or account of Slade and Bender was to be a portal through which the Cherokee Nation could carry the rights and wrongs of its people to a judicial forum," as this was to be done only on condition that the National Council should find such accounting incorrect or unjust. The National Council accepted the account as correct, and the Secretary approved it. It should have been paid. There was no occasion for further legislation.

8. R. p. 51, the Court says: "The action of the Secretary of the Interior combined with the inaction of Congress to direct anything to the contrary, makes this provision of the argument final and conclusive." The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament."

9. P. 44, defendants' brief: "The case is wholly unaffected by the report of Slade and Bender, except in so far as it exhibits the true state of the account, the record of the facts, and acts of the Government, as they actually occurred at the respective times of the various transactions." The United

States herein admits that the account of Slade and Bender is correct as to amount, time and place. Not much more is needed for our argument. His predecessor, Mr. Gorman, said: "The facts are historical in their nature—are not subject to dispute or controversy. The question presented by the record is purely one of law, to wit: whether the cost of the removal of the Eastern Cherokees to the Indian Territory is to be borne by the Cherokee Nation and deducted from the Treaty fund, or whether the cost thereof is to be defrayed by the United States without charge to the Indians." This is the gist of the whole matter, and the words of the treaty are so clearly stated that it seems impossible to mistake its meaning.

10. P. 51 to 53. Government brief: The United States agreed to remove the Indians, without any specification as to what the cost might be, at its own expense. They were to be given $5,000,000 for 14,000,000 acres of land, in North Carolina, Georgia, etc., removal, subsistence on the passage, and subsistence for one year after arriving. It has been the custom of the Government from time immemorial, whenever it has removed a tribe of Indians to remove them at its own expense, and the removal has been in nearly every instance, to accommodate the Government and not the Indians. I have not been able to find an instance where the Indians have removed themselves. These people had no desire to leave their homes, but were forced away at the point of the bayonet.

I think it simply an inference of the solicitor and not a fact

that any further cost of removal above $600,000 was to be deducted from the $5,000,000 fund. Read Article 15, Treaty of 35 in this connection and read Article 3 of the Treaty of 1846.

All this was enacted after the appropriation of the amounts, and matters and things named in counsel's brief for the Government, showing that a contrary intent prevailed.

12. P. 83, Government brief: "In order to ascertain the per capita division to be made, pursuant to the Treaty of 1835, which per capita division finds mention only in Art. 15, of that Treaty." Read Art. 9 of the Sixth Treaty of Washington, and the latter part of Art. 3, preceding it.

13. P. 89, Government brief: "Prior to the payment of the sums thus appropriated by them, the Western Cherokees and the Cherokee Nation protested against these settlements as insufficient,—the Western Cherokees because they had been charged with the cost of subsistence, contrary to the resolution of the Senate, and the Cherokee Nation because the Treaty fund had been charged with a part of the cost of removal." This passage itself, although quoted for a contrary effect, shows that the claim we make today under "The Agreement" for the conveyance of the Cherokee Strip, a piece of land large enough to form a State, and whose unprecedented settlement leads them now to clamor for admission as a State, wherein the United States agreed to settle all of its old disputed accounts with the Cherokees, is the same claim made in 1851, viz.: that the Treaty fund had been charged with the

cost of removal. This is probably the last suit that will ever be brought by the Cherokee Nation v. the United States. This statement is conflicting. The protests here were made by the Western Cherokees, and the Cherokee Nation, whom we have considered heretofore as one, and the receipts were given according to this authority by the Western Cherokees and the Cherokee Nation. Art. 12 of the Treaty says, "the Western Cherokees, called Old Settlers." We admit and claim that the Cherokee Nation at that time, Aug. 23, 1894, received all the money that was due to it. Doc. 11, 54th Con. 1st Sess. But this settlement evidently did not include the 4,000 or 5,000 North Carolina and North Georgia Cherokees, for whom we are contending for they cannot be considered as emigrants, and are residing still at or near the place of their birth, and those of their children, who have removed West since 1850, who make up principally these individuals and families of Cherokees named herein. It was their land that was sold to create the $5,000,000 fund, and as they have never removed at all could hardly be charged with a bill for removal.

14. Government brief, p. 96: The solicitor again arrives at the gist of this controversy and says: "The question is whether the remainder was to be charged against the $5,000,000 fund, or to be paid by the United States in addition thereto." In answering this, we refer again to the wording of the Treaties of 1835 and 1846, and to the Cherokee Agreement, of which the payment of this award forms a part of the compact. The

amount received by the Government is a very ample compensation for this demand, principal and interest, large as it is, and should have been paid without demurrer, or the incurrence by the Cherokees of the great expense and delay of legislative and judicial action. The Government has already enjoyed the usufruct for 12 or more years.

15. The payments, however set forth on pages 89 and 90 of Government brief, with receipts attached to John Drennan, were in part for subsistence, and in part for removal, and we admit that at that time the Western Cherokees or Old Settlers, alias the Cherokee Nation, received the part payment for their removal, and the balance of the one-third set apart for them in the Sixth Treaty of Washington, January 18, 1866, both subsistence and removal being based on Art. 4 of that Treaty, but not so the Eastern Cherokees. Strangely enough these receipts do not show for what they were given, but the Indians were obliged to sign them, in order to get money at all.

The Congress of the United States has always recognized its obligation to remove the Indians at its own expense, and did so with the Choctaws, Chickisas and Creeks, not only in the treaties in which it promises to refund those who pay for their own transportation, but it has repeatedly paid back to individual Cherokees the money which they have expended for their own removal, and the Auditor of the Treasury allowed a goodly number of such cases as late as Aug., 1893, but did not pay them. (See testimony on file in this case.)

Interest.

16. Interest is charged upon the sum in question because the $1,111,284.70 was taken from an interest bearing fund—a trust fund in the hands of the Government, and all of the sums heretofore paid from this fund have borne interest at the rate of 5 per cent per annum from the date of the wrongful taking. Mention is made of interest in the Treaty of 1846, and it was agreed that the question of interest should be left to the Senate, whereupon the Senate voted that interest should be paid from June 12, 1838 at 5 per cent to date of payment.

17. This is not such a case as was contemplated in U. S. R. S. Sec. 1091, but is a case in which the payment of interest seems to be inseparable from the payment of the principal itself. Interest was paid on the subsistence fund in the two cases and interest was allowed on the one-third share of the removal fund paid to the Western Cherokees or Old Settlers. The skilled accountants, whom Government counsel admits could state a correct account, allowed interest on the four items, one running back to February 27, 1819, and Government counsel has accepted and allowed it without demurrer, and the Court of Claims after a careful and painstaking hearing lasting through two weeks of its session, has given its judgment for interest on this account. To deny interest to these people after the Government by its own wrong has allowed them to suffer this long delay, and then has renewed this promise of payment; required them to secure special legislation in two

instances, and the decision of the two highest courts in the United States, with its brightest legal talent arrayed against them, would seem to be adding insult to injury, to say nothing of the payment for the labors of their own attorneys.

18. The Government allowed interest on the deferred payments with reference to the Outlet, and Congress appropriated money for the interest. It was a real estate transaction, and so is this claim in effect.

In that case the United States received 14,000,000 acres of land and the Indians $8,600,000, or about 61 3-7 cents per acre, one of the largest real estate deals among the many that the Government has made with the Indians. This Government has paid millions for battleships, let it pay its honest dues to the Cherokees without quibbling or technicalities.

The Cherokee Nation or Western Cherokees.

19. The Eastern and Emigrant Cherokees agree with the Cherokee Nation in its contention against the Government that it should pay the $111,289.70, with interest at 5 per cent per annum from June 12, 1838, but differ with them commencing with page 89 of counsel's brief, where he asks that this whole sum should be paid to the Cherokee Nation for distribution—a proposition under their present legal status, that this Court can hardly consider. If it should do so, then we ask, as we asked in our intervenor in their cause which the record was corrected in order to set forth; that one-fourth of the whole

sum should be adjudged to the Eastern and Emigrant Cherokees to be distributed by the Secretary of the Interior to the persons entitled to receive it. Since our intervenor about 1,500 persons of the same class have been added to our numbers. This request is made on account of reasons set forth in our intervenor.

20. The 15th article of the Treaty of New Echola says, after providing "for the additional quantity of lands and goods for the poorer classes of Cherokees and the several sums to be invested for the general national funds provided for in the several articles of this treaty; the balance, whatever the same be, shall be equally divided between all the people belonging to the Cherokee Nation East, according to the census just completed, and such Cherokees as have removed West since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final Treaty between the United States and the Cherokees East, they shall also be paid for their improvements, etc."

2 / Mr. Gorman, Mr. Pradt's predecessor, now deceased, in his brief in this cause before the Court below, said, "the payment of this money when made, in order to comply with the Treaty must be made per stirpes, or per capita, and so my clients understand it. (This includes the Treaty of 1835 and 1828, Art. 17, latter portion.) "All stipulations in former treaties which have not been superseded or annulled by this, shall continue in full force and virtue."

22 Art. 3, Treaty of 1846: The said United States agree to reimburse the said fund, the amount thus charged to said fund and the same shall form a part of the aggregate amount to be distributed to the Cherokee people as provided in the 9th article of this Treaty." * * * The United States not only agree to pay for the expenses of the Treaty, "but all other sums improperly charged, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty. Ninth article says: "And the several sums provided in the several articles of the Treaty to be invested as the general funds of the Nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the Treaty of 1835. The aggregate of which several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives entitled to receive the same under the Treaty of 1835, and the supplement of 1836, being all those Cherokees residing East at the date of said Treaty, and the supplement thereto."

23 Art. 10. It is expressly agreed that nothing in the foregoing Treaty contained shall take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi river, had or may have under the Treaty of 1835 or the supplement thereto.

This is our case—this takes in our people, but payment to

the Cherokee Nation would take away every dollar of our inheritance.

24 The Eastern and Western Cherokees referred to by counsel for the Nation does not include our people, or the North Carolina and Georgia Cherokees and Eastern Tennessee, nor those who have gone West since the date of union, or those whom we term Eastern and Emigrant Cherokees, now numbering 6,000 persons more or less, who have sued as individuals, and whose lands were sold to create the fund in contention.

THE EASTERN CHEROKEES.

25 We are in accord with the Eastern Cherokees and agree with their contention both as against the United States and against the Cherokee Nation, but differ from them in the award of the fund. They claim a judgment for the whole fund and that their clients include the Eastern and Emigrant Cherokees, which we deny. We ask for one-fourth of the whole sum to be distributed as named, and believe that the Eastern Cherokees should receive the balance.

BELVA A. LOCKWOOD,
Counsel for Eastern and Emigrant Cherokees.

FILE COPY.

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Supreme Court of the United States

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
JAN 4 1906
JAMES H. McKENNEY,
Clerk

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THE UNITED STATES AND THE CHEROKEE NATION.

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THE CHEROKEE NATION, APPELLANT,

v.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Brief of the Eastern Cherokees.

THE EASTERN CHEROKEES,
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Brief of the Eastern Cherokees.

STATEMENT OF THE CASE.

The Eastern Cherokees, appellants, are the Eastern Cherokees, both East and West of the Mississippi River, suing as a band of the Cherokee Tribe, and as one body.

They comprise those Cherokees who owned and occupied the lands east of the Mississippi River sold the United States by the Treaty of 1835-36. The proceeds of this sale, less certain agreed charges, was promised them per capita and is now the object of this suit.

The Emigrant Cherokees (Rec. 8) are not a band, but private persons claiming to be Eastern Cherokees and, as such, to be entitled to share in the per capita.

The Cherokee Nation, appellant, appears as a body politic or governmental organism.

In 1828 the United States obligated themselves by the 8th Article of the treaty of that date to remove the Eastern Cherokees from the east to the west of the Mississippi River and to subsist them for twelve months at the expense of the United States.

This was the general policy of the United States in dealing with all Indians east, the Choctaws, Chickasaws, Creeks, Seminoles, and adjacent tribes, and was due to political considerations of the highest importance.

On March 6, 1835, the Senate of the United States upon submission of the question, made an "award" by a resolution, advising the payment to the Eastern Cherokees of the sum of five million dollars for their "lands and possessions" east of the Mississippi. The five millions proposed to be paid as the purchase price of the "lands and possessions" included no other consideration. When this award was made the United States was under the subsisting obligation, above mentioned, to pay the entire cost of the removal and subsistence expenses of the Eastern Cherokees.

On October 23, 1835 a proposed treaty, bearing date March 14, 1835, was submitted to the Cherokee council at Red Clay, proposing to pay the Cherokees five mil-

lions of dollars for their lands and possessions. In Article 18 of this instrument there was a schedule of items to be charged against the five million fund. Among these items was a charge of $255,009 for removal. The proposed treaty was unanimously rejected, even those believing a treaty necessary and favoring a treaty, refusing to support this proposition to charge the Cherokees with the cost of removal. This proposed treaty was explained by a letter of President Andrew Jackson, read to the Cherokees October 23, 1835, which stated among other things, that the United States would pay the cost of the removal and subsistence of the Cherokees at its own expense, and would pay the Cherokees a per capita of $150 each on their arrival in the west.

Treaty of 1835-36.

On December 29, 1835, a treaty was signed by a few unauthorized Cherokee citizens, selling to the United States the whole Cherokee country, 7,882,240 acres.

By Article 1, the United States agreed to pay five million dollars to the Cherokees for their lands and possessions.

By Article 8, it was agreed the United States would "also" remove the Eastern Cherokees and subsist them one year after their removal west, and that self-emigrating Cherokees should be reimbursed at the rate of $20 per capita for removal and $33.33 for subsistence.

By Article 15, which provided that the balance of the five millions after certain deductions should be paid the Eastern Cherokees per capita, the words "removal, subsistence," were inserted as items to be deducted from the five million fund.

The Indians who signed this instrument, immediately

protested that the Cherokee people supposed the five million fund was not intended to include the expense of removal. This was confirmed to the President of the United States on February 29, 1836, in a letter of Senator Cuthbert and others, who had voted the Cherokees the award of March 3, 1835. The President obviously thought the Cherokees right in their contention and submitted supplementary articles by which the Senate of the United States decided, May 18, 1836, that it was not the intention of the Senate that the five million fund should include the expense of removal.

On July 2, 1836, Congress sanctioned and confirmed the interpretation of the Senate and appropriated a sum estimated as more than sufficient to meet the entire cost of removal expenses, and of spoliations, which also was not intended to be included in the five million fund.

After this treaty had been ratified the War Department still held that the obligations of the 8th Article of the Treaty of 1828 were in full force and so advised the Cherokee Indian agent, B. F. Curry, November 18, 1836. The Cherokees, of course, were apprized of this executive construction.

After this treaty the War Department continued to advise the Cherokees that they would be removed and subsisted at the expense of the United States and would be paid a per capita of $150, as promised by President Jackson in the letter read to the council of Cherokees at Red Clay October 23, 1835. The War Department so instructed Lieutenant J. VanHorne, its enrolling agent, September 12, 1837.

On December 6, 1837, Attorney General B. F. Butler held (3 Op. 297) that:

"The expense of removal is undoubtedly the first charge on the $600,000."

The Indians who signed the Treaty of 1835-36, were bribed by the commissioner negotiating the treaty, who paid them over $30,000 for their services and expenses. These unhappy men were outlawed and many of them assassinated by the Cherokees.

The Eastern Cherokees almost unanimously refused to recognize the treaty as binding on them, and neither the Eastern nor the Western Cherokees recognized it as a valid instrument until the Treaty of 1846, and except in the manner provided by that treaty.

Removal of 1838.

In May, 1838, the Cherokees were made captive by an army under General Scott, and thrown into camps of concentration.

John Ross, the Principal Chief of the Cherokees, besought the War Department to make a treaty which the Cherokees could recognize. His prayer was refused, but the Secretary of War proposed to the Cherokees that they might emigrate themselves and that the United States would defray the expense of their removal. This communication to John Ross of May 18, 1838, was submitted to Congress by the President of the United States, and was sanctioned and approved by Congress, which, having required an estimate to cover the entire cost of removal and subsistence, appropriated the full sum estimated for, to wit, $1,047,067, on June 12, 1838. The Act of Congress appropriating this money contained the following proviso:

"That no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty."

The War Department had already placed in the hands of a disbursing agent of the United States, Cap-

tain John Page, a large fund taken from the five millions for the purpose of meeting the expense of the removal by the military as determined on in the previous May. The War Department used this fund for removal expenses and expended the sum of $1,111,284.70, out of the five million fund, for removal expenses; while the fund appropriated for removal, $1,047,067, on June 12, 1838, remained in the Treasury of the United States untouched until January 1, 1839, when the removal had been practically concluded.

The Eastern Cherokees took their government west and thus became involved in a fierce conflict with the Western Cherokees, who refused to relinquish their government previously established, or to merge with the Eastern Cherokees.

On January 17, 1845, Hons. Roger Jones, R. B. Mason and P. M. Butler, commissioned by the President to inquire into the Cherokee difficulties, made their report to the effect that the $5,000,000 fund was not chargeable with the expense of removal, and that the per capita promised the Cherokees was due and should be promptly paid.

Treaty of 1846.

The Treaty of 1846 was made necessary to stop the warfare between the Cherokees, to settle the claims of both the Eastern and Western Cherokees against the United States, and to make the Eastern and Western Cherokees parties to the Treaty of 1835-'36, which they had never conceded themselves to be.

The Treaty of 1846, by Article 4, arranged a plan by which the Western Cherokees should be paid for their communal interest in the lands east. The Western Cherokees have been fully paid under this article under a decision of this Court, October Term, 1902 (148 U. S., 427).

The Eastern Cherokees were to be paid for their communal interest in the lands east, as by Article 9, Treaty of 1846, as qualified by Articles 3, 10 and 11.

Article 9 pledged the Eastern Cherokees a "fair and just settlement" under the Treaty of 1835, which settlement should exhibit "all moneys properly expended under said treaty," and should embrace all sums paid under the various captions ordinarily used to describe the different heads of expenditure, to wit, improvements, ferries, spoliations, removal, subsistence, debts, invested funds, etc. with the provision that such expenditures should be deducted from the sums appropriated to the Eastern Cherokees aggregating $6,647,067, and the balance should be paid to the Eastern Cherokees per capita.

The aggregate referred to was composed of the five million fund; the $600,000 appropriated July 2, 1836; and the $1,047,067 appropriated June 12, 1838.

When the Auditing Department made up the account of the Eastern Cherokees under the 9th Article, they charged the five million fund with the sum of $1,111,284.70 for removal expenses, contrary to the understanding of the Cherokees and contrary to the interpretations made by the War Department, by the Department of Justice (3 Op. 297) by the Senate, and by the Congress as heretofore set out, and found due the Eastern Cherokees only $914,026.13.

Congress appropriated the money by Act of Sept. 30, 1850	$189,422.76
And Act of Feb. 27, 1851	724,603.37
	$914,026.13

which accordingly was paid the Eastern Cherokees per capita in 1852.

The Cherokees before receiving such payment under this accounting rendered by the Auditing Department made their proper protest through the National Council, setting up that it was unfair to them and contrary to the meaning of the treaty and that the expense of removal was not chargeable to the $5,000,000 fund, and having so protested they were paid in accordance with the Act of Congress. The Act of Congress required the Cherokees to give a receipt for all claims and demands on the United States, "except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees."

The Eastern Cherokees vainly endeavored to secure the balance so held in trust for them under Act of July 2, 1836, and payable per capita by the United States, but were unable to do so.

The Cherokee Agreement of 1891.

In 1890 the United States sought to buy the Cherokee Outlet from the Cherokee Nation, which at that time was composed of the Eastern Cherokees and Western Cherokees and their descendants, of the Delawares, Shawnees and adopted Freedmen who had been made citizens of the Cherokee Nation by the treaties of 1866, and by the Delaware and Shawnee agreements.

The Eastern and Western Cherokees had never been paid all the money due them per capita under the Treaty of 1846, for the lands they had sold the United States in 1836, and they refused in 1890, to sell the Cherokee Outlet to the United States.

In 1891, under the further solicitation of the United States, the Cherokee National Council representing all the Cherokee citizens who owned the Cherokee Outlet, agreed that it would sell the Outlet, which exceeded

eight millions acres, for a certain sum in cash, and for a further consideration, and as a condition precedent, that the United States would render to the Cherokees a full account of the moneys due them under the various treaties, and that if the United States should find upon its own accounting that there was money so due the Cherokees, that the United States would immediately pay it. By this stipulation of the agreement the Cherokees also had the right, in case they thought the accounting was unjust or incorrect or improperly made, to bring suit against the United States with the right of appeal to the Supreme Court.

On March 3, 1893, Congress ratified this agreement and provided for the accounting.

When that agreement was negotiated, the Western Cherokees were prosecuting a suit against the United States for the balance of the per capita due them under Article 4 of the Treaty of 1846. The case was decided by the Supreme Court, April 3, 1893, and under the decision the Western Cherokees have been paid in full for their interest in the lands east of the Mississippi River. (148 U. S., 427.)

They made no claim to the expert accountants during the making of the account; none was made for them, and nothing was allowed to them. The accounting pointed out the settlement made with them by the Supreme Court. They were satisfied with the settlement, and the Western Cherokees are not now claimants, and are not parties to the pending suit.

The Account Was Rendered May 21, 1894.

On May 21, 1894, the United States having made up the account in the manner and form agreed on, rendered said account to the Cherokee Nation. On De-

cember 1, 1894, the Cherokee National Council accepted the accounting, which included three items of trifling amount, which the United States conceded in the Court of Claims, and one great item of $1,111,284.70 with interest from June 12, 1838, until paid. Interest was allowed on this sum in pursuance of the award of the United States Senate of September 5, 1850. A submission of this question of interest had been provided by Article 11 of the Treaty of 1846, and the Senate had found, September 5, 1850, that interest at the rate of five per cent. per annum, should be allowed upon all sums found due the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid. (Senate Journal, 31st Congress, 1st Session, p. 602.)

Congress sanctioned and confirmed this award of the Senate and paid interest in accordance with the award on various occasions where partial payments were made. The Supreme Court of the United States found that the award of the Senate was controlling as to the balance due the Western Cherokees (148 U. S., 427). The allowance of interest in this case is identical in principle with that found due by the court in the case of the Western Cherokees.

This sum, $1,111,284.70, was found as the balance of the per capita promised under Article 9 of the Treaty of 1846 to the Eastern Cherokees.

It was not paid by the United States as agreed to be paid, but on July 1, 1902, Congress passed an act authorizing suit to be brought by the Cherokee Tribe or any band thereof for any sums claimed under any of the treaties.

The Cherokee Nation thereupon brought suit in the Court of Claims against the United States February 20,

1903, not as a Tribe of Indians, but as a body politic. (Rec., 1.)

On March 3, 1903, the Eastern Cherokees were authorized to bring suit for the identical claim now in suit, the Cherokee Tribe to be made party to such suit and the judgment to go to the "rightful claimant." (Rec., 78.)

The Eastern and Emigrant Cherokees so called, who were private individuals claiming to be Eastern Cherokees, brought suit on the ground that they were parties in interest in the pending suit, and filed their petition March 10, 1903.

The "Eastern Cherokees" under the authority of the Act of March 3, 1903, filed their suit March 14, 1903, as a "band" of the Cherokee Tribe.

These suits were consolidated and the parties required by the court to interplead.

The Cherokee Nation did not answer the petition of Eastern Cherokees against it and did not interplead, but contented itself by replication to intervening petition of Eastern Cherokees with a denial of any past, present or future relation of trust between the Cherokee Nation, and the Eastern Cherokees. It claims the fund for itself as a body politic. (Rec. 1, last paragraph, 40, last paragraph.)

The consolidated cases were heard on February 14, 15, 16, 20, and 21, 1905, by Messrs. Charles Nagle and Edgar Smith and Frederick D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood on behalf of certain individual claimants styled Eastern and Emigrant Cherokees; and Mr. Assistant Attorney General Pradt on behalf of the United States; and submitted.

Judgment of Court of Claims.

On March 20, 1905, the opinion of the court was delivered with concurring and dissenting opinions. On May 18, 1905, was rendered the findings of fact, conclusions of law and judgment.

The court decreed that the Cherokee Nation do have and recover of and from the United States as follows:

Item 1. The sum of $2,125, with interest thereon at the rate of 5 per cent. from February 27, 1819, to date of payment.

Item 2. The sum of $1,111,284.70, with interest thereon at the rate of 5 per cent. from June 12, 1838, to date of payment.

Item 3. The sum of $432.28, with interest thereon at the rate of 5 per cent. from January 1, 1874, to date of payment.

Item 4. The sum of $20,406.25, with interest thereon from July 1, 1903, to date of payment. (Rec., p. 112.)

Items 1, 3, and 4, we understand are not in controversy, being conceded by the United States.

The Eastern Cherokees do not dispute with regard to such items but point out that they are made payable to the United States as trustee for the Tribe.

The judgment further provides as follows:

The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the Act of March 3, 1903 (32 Stat. 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

1st. To pay the costs and expenses incident to ascer-

taining and identifying the persons entitled to participate in the distribution thereof, and the costs of making such distribution.

2nd. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the Treaty of New Echota, as proclaimed May 23, 1836, or the Treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals. (Ibid, 113.)

The United States by their Attorney General Mr. Louis A. Pradt, prayed an appeal on June 8, 1905, from the said judgment, which appeal was allowed.

The Eastern Cherokees by their attorneys, Robert L. Owen and Robert V. Belt, made application for an appeal on the 9th day of June 1905, which was allowed; and the Cherokee Nation by its attorneys Messrs Finkelnberg, Nagel & Kirby and Edgar Smith on July 3, 1905, prayed an appeal from so much of the judgment—

"As provides that the sum of $1,111,284.70, with interest thereon from June 12, 1836, to date of payment, less certain counsel fees and expenses, shall be paid to the Secretary of the Interior to be by him distributed in accordance with the further terms of said judgment." (Rec. 115.)

This appeal of the Cherokee Nation was allowed. In effect it is an appeal against the payment of said fund to the Eastern and Western Cherokees per capita. In the replication of the Cherokee Nation to the intervening petition of the Eastern Cherokees (Rec. p. 40, last paragraph), the attorneys of the Cherokee Nation expressly denied that the Cherokee Nation if it should collect such fund would hold it as an implied "trust for the benefit of the Eastern Cherokees exclusively or otherwise." In effect they maintained the money be-

longed to the Cherokee Nation as a government and not as a representative of its citizens.

The Eastern and Emigrant Cherokees represented by Mrs. Belva A. Lockwood made no application for appeal.

Specification of Errors.

The court erred in awarding judgment in favor of the Cherokee Nation against the United States for—

Item 2. The sum of $1,111,284.70, with interest thereon at the rate of five per cent, from June 12, 1838, to date of payment.

2. The Court erred in refusing to award judgment in favor of the Eastern Cherokees against the United States for the said sum of $1,111,284.70, with interest thereon at the rate of five per cent from June 12, 1838, to date of payment.

3. The Court erred in decreeing the distribution of the said fund of $1,111,284.70, with interest, to be realized from its said judgment, among both Eastern and Western Cherokees.

4. The Court erred in directing that the Western Cherokees be permitted to share in the said fund of $1,111,284.70 with interest.

5. The Court erred in charging the said fund of $1,111,284.70 and interest, to be realized from its said judgment or decree, with the fees of the attorneys for the Cherokee Nation.

In support of the first and second assignments of error, to wit: That the court was in error in awarding a judgment or decree in favor of the Cherokee Nation against the United States as to item 2, and that the court was in error in refusing to award judgment in

favor of the Eastern Cherokees against the United States for the said sum of $1,111,284.70, with interest thereon, at the rate of five per cent per annum from June 12, 1838, to date of payment, it will be insisted that the amount constituting item 2 in the finding of the accountants is not in any sense due the Cherokee Nation either as a government or as a trustee for the Eastern Cherokees, or as trustee for any other or others of its citizens. That fund is directly the proceeds of the lands ceded in 1835 by the Eastern Cherokees to the United States, and under the decisions in the case of the Delaware Indians, of the Shawnee Indians, and of the Cherokee Freedmen, the Eastern Cherokees, upon the same principle laid down in those cases, are entitled to an exclusive recovery of this fund; that if the judgment of the Court of Claims is held to be a judgment in favor of the Cherokee Nation as a trustee, the court was clearly in error, because the Eastern Cherokees by act of Congress of March 3, 1903, were given the capacity to maintain the action for themselves as against the United States and against the Cherokee Nation; and also because the Cherokee Nation could not in the capacity as trustee or otherwise receive or disburse one dollar of the fund realized for the judgment upon Item 2, and being therefore incapable of discharging the duties of such trust cannot receive judgment. (Act of June 28, 1898, 30 Stat. 502, Sec. 19; Act of July 1, 1902, 32 Stat. 726.)

Moreover in an equity case no one but the equitable owner is entitled to the judgment. It is unreasonable to give judgment to an alleged trustee who denies his trust who is not claimant as trustee, whose legal capacity as trustee has been vacated by statute and where the court must immediately refuse the trustee the fund, because of its utter incapacity.

Even in case of the three items of the judgment, 1, 3, and 4, conceded to the Tribe the sums must go and does go to the United States as Trustee, the Tribe having no capacity to receive or conserve.

In support of the third and fourth assignments of error it will be insisted that the Western Cherokees, who by the judgment or decree are permitted to participate in the fund, have been heretofore, under the decision of the Supreme Court of the United States of April 3, 1893 (148 U. S., 427) paid a sum representing the balance due them for their proportionate interest in the lands ceded by the Eastern Cherokees from the sale of which the said fund of $1,111,281.70 is derived; and therefore that the sum agreed to be paid to the Eastern Cherokees for their interest in the said lands east of the Mississippi River ceded under the treaty of 1835-36, is not liable to deduction for payment the second time to the Western Cherokees of the value of the latter's interest in said lands; and, further, that the amount agreed to be paid by said treaty of 1835-36, was to be and is to be paid to the Eastern Cherokees without deduction for any purposes; and, finally, that the Western Cherokees not being a "claimant" this suit, cannot receive a judgment under the jurisdictional act.

In support of the fifth assignment of error it will be insisted that as the attorneys for the Cherokee Nation contracted with that nation to represent it and to claim the fund for itself as a government as against the Eastern Cherokees, and as said attorneys for the Cherokee Nation have complied with this agreement, and in the court below, and in this honorable court, have claimed this fund for the nation in its capacity as a government and have denied in express terms that the Cherokee Nation in securing the account-

ing under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees and for their exclusive use and benefit, and have further denied that if the Cherokee Nation had collected or shall hereafter collect such moneys, the sum would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise, (Rec. p. 40) the charge for compensation to these attorneys will be taken from a fund held in trust, if held at all, by the Cherokee Nation, for services rendered, not in support of the trust, but in denying the trust and opposing its establishment.

BRIEF OF ARGUMENT.

Signification of the Term "Cherokee Nation."

It is of the highest importance in considering this case to keep clearly in mind that the term "Cherokee Nation" has been used in various senses.

First, to represent the people themselves, as a tribe or Nation of Indians.

Second, the government of the Cherokees.

Third, the government as trustee for all of its people or for some of its people as their rights might appear under the treaties by which the rights of such communities within a community had been established.

In the treaty of July 2, 1791, the "Cherokee Nation" was described as "all the individuals composing the whole Cherokee Nation of Indians" (Article I.)

Thereafter the term "Cherokee Nation" was used interchangeably with the term "Cherokees" as having the same significance.

In the Treaty of 1835 these people are referred to (Revised Indian Treaties), as the "Cherokees" on pages

65, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76; as "The Cherokee Nation," on pages 65, 67, 68, 69, 70, 71, 72, 74, 75, etc. In the Treaty of 1846 they are referred to as "The Cherokee Nation" on pages 79, 80, 81, 82, 84; as "The Cherokee People," on pages 79, 80, 81, 82, 83; as "The Cherokees," on pages 81, 82, 83, 84, and 85.

It should be clearly remembered that the Cherokee Nation as a government has no property and never has had any property and never will have any property. The lands of the Cherokee Nation belong strictly to the "whole Cherokee people" by Article 1 of the Treaty of 1846. The lands which the Cherokees sold east of the Mississippi River belonged to the whole Cherokee people as then existing, as communal property. The western Cherokees were paid for their interest in such lands as communal owners upon a plan agreed to in Article 4 of the Treaty of 1846.

The communal interest in such lands of the Eastern Cherokees was to be paid for as provided in Article 9 of that treaty; the Western Cherokees have been fully paid (148 U. S., 427). The Eastern Cherokees are now seeking the balance of the purchase price due them under Article 9 of that treaty.

In the case of Whitmire vs. the United States (30 C. of Cls., 159), the court said:

"The United States have repeatedly recognized in their transactions with the Cherokees the dual character of the people, sometimes national, sometimes communal. They have also recognized portions of the people as distinct communities. In 1835 they so dealt with the Georgia Cherokees as communal owners, setting apart a portion of the purchase money for their lands for national purposes, but paying part to them per capita. In 1846 they so dealt with the Western Cherokees, segregating them from the mass of their countrymen and paying them individually, a community within a community."

See also

Eastern Cherokees *v.* The United States, 20 Ct. Cls., 449.
Western Cherokees *v.* U. S., 27 Ct. of Cls., 1, 53.
Blackfeather *v.* The U. S., 27 Ct. Cls., 447.
Journeycake *v.* U. S., 28 Ct. Cls., 281.

Chief Justice Nott in the opinion of the Court of Claims in the consolidated case now pending said (Rec., 53):

"While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate; and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration per capita. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs, and head men of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the Treaty of 1835, were equally interested, with the communal owners who were carried to

the West, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed per capita. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund; but their rights were inextricably woven with the rights and equities of the Cherokees, who were citizens of the nation; and the nation properly made no distinction when parting with the outlet, but demanded justice, from the Cherokee point of view, for all Cherokees who had been wronged by the non-fulfillment of the treaty of New Echota. As to these Eastern non-resident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.

"After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the money awarded should be paid directly to the equitable owners."

The court thereupon refers to the present status of the Cherokee Nation that it is about to terminate and says (Rec., 55):

"In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person which should not be entrusted with the receipt and distribution of the moneys belonging to other persons."

By the Indian Appropriation Act of 1897 the Cherokee courts were dismantled and its executive department and legislative department practically vacated and destroyed in 1898. By the Act of June 28, 1898 (30 Stat. 502, Sec. 19), it was provided as follows:

"That no payment of any moneys, on any account whatever, shall hereafter be made by the United States to any of the tribal governments or any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction

of the Secretary of the Interior by an officer ap pointed by him; and per capita payments shall be mad e direct to each individual in lawful money of the United States; and the same shall not be liable to the p ayment of any previously contracted obligation."

Under the Act of July 1, 1902, known as the Cl herokee Allotment Act (32 Stat., 726), it was provided t hat the lands of the Cherokee Nation belonging to the Chero kee people should be allotted and (Sec. 64) th ereafter the Cherokee Nation as a body politic was forbi dden to collect a dollar of the Tribe's revenues, and th at what remained of the so-called "government" of the C herokee Nation should entirely cease March 3, 1906 (Se c. 63).

The fact is the Cherokee government was pra ctically abolished by Congress in 1898 (30 Stats., 83; 30 Stats., 502). They could not make laws except with t he consent of the Secretary of the Interior and the Pr esident nor enforce them when so made. Their judges an d court officials, their sheriffs and constables and guar ds and jails were vacated and nothing remained but the empty form of a so-called Chief and Council whose au thority had been destroyed by Act of Congress. In the current year, 1905, the Chief, so-called, d eclined to call an election for the council and th e last regularly elected council expired by limitation in Oc tober, 1905, so that this alleged body politic has n o judi cial department, no legislative department, and noth ing but a so-called Chief, a mere clerk, whose of fice ex pires March 3, 1906, and whose right to hold o ffice is being disputed at this time by proceedings in t he In terior Department. This is the dismembered body politic which demands judgment for itself as agai nst the Eastern Cherokees. This is the government (?) which denies its trust "to the Eastern Cherokees exclusively

or otherwise" if it should recover the fund in controversy. (Rec. 40.)

When Congress appropriated the moneys found due by the Auditor under Article 9 of the Treaty of 1846, the appropriation was made by Congress to the "Cherokee Nation" and not to the Eastern Cherokees in terms, although that was the real meaning of the Appropriation Act. The matter was submitted to the Attorney General of the United States and in his opinion of April 16, 1851 (5 Op. 320), Honorable John J. Crittenden held as follows:

> "The Cherokee Nation referred to under the acts approved September 30, 1850, and February 27, 1851, are the Cherokees described in the 9th Article of the Treaty of 1846, being all those Cherokees residing east at the date of the Treaty of 1835 and the supplement thereto.
>
> Paying per capita to the citizens of the Cherokee Nation is payment to the Nation, but payment to its national authorities may not be so."

When the Cherokee Nation received the money proceeds of the Cherokee Outlet in 1893, Congress did not permit that government to distribute such funds to one part of its citizens, Cherokees by blood, as against the Delawares, Shawnees and Freedmen, but authorized the courts to determine the rights of these communities within the community and the courts determined that the Delawares and Shawnees and Freedmen, as communal owners of the lands of the Cherokee Outlet, were entitled to the proceeds of the property owned by them. The Delawares, the Shawnees, the Freedmen and the Cherokees by blood were therefore paid a like distributive share of the proceeds of the sale of these lands.

The Cherokee government was not permitted to claim the fund as a government under this so-called Cherokee

agreement and contract of sale. It is true the contract of sale ran in the name of the Cherokee Nation. The contention, however, that the Cherokee Nation meant the Cherokee government which might exercise its discretion with regard to such fund or that the fund itself belonged to the Cherokee Nation as a government was settled by the courts adversely to such pretension in the Delaware, Shawnee and Freedmen cases. In this settlement by the courts the Cherokee Nation acquiesced, and has never since denied the proposition. Even with regard to the very fund in question the Cherokee National Council on December 7, 1900, in an Act of that date expressly conceded the right of the Eastern Cherokees to the fund now in question in the following language:

"Be it further enacted, that all moneys which may be collected belonging to the $5,000,000 treaty fund of 1835 shall be paid out per capita when collected to the persons entitled thereto, as set forth in the 9th Article of the Treaty of 1846." (Rec. 40, §4.)

This act [filed in the Court of Claims, Congressional Case, 10386, and being of record in the Interior Department], while recognizing the right of the Eastern Cherokees, was objected to by them, in formal protests to the President of the United States, on the ground that the Eastern Cherokees had already organized in their own behalf and employed counsel and that the contract to employ Turner and Halsell as proposed by such act was wasteful. The President disapproved the act. The act of December 7, 1900, above referred to, was approved on that day by Hon. T. M. Buffington, Principal Chief of the Cherokee Nation. Notwithstanding his approval of this act with its recognition of the rights of the Eastern Cherokees he there-

after employed counsel to deny the right of the Eastern Cherokees and to claim the fund for the Cherokee Nation as a government, denying that the Cherokee Nation, if it should recover such fund would hold the same as an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise (Rec., 40, last paragraph).

When the Delawares, Shawnees and Freedmen recovered from the Cherokee Nation their proportionate part of the purchase price of the Cherokee Outlet, it was on the principle that they were communal owners of the land of which the fund was the proceeds. When the Western Cherokees recovered judgment in 1903 (148, U. S. 427), it was on the principle that the fund was the proceeds of the sale of their communal interest in the lands East of the Mississippi River. The Eastern Cherokees now seek to recover on the same principle, that the fund found due, as the balance under Article 9 of the Treaty of 1846, is the true balance of proceeds of the sale of their communal interests in the lands east of the Mississippi River pledged to them per capita in express terms by Art. 15, Treaty 1835-36 and by Art. 9, Treaty 1846.

The Interpretation of Indian Treaties.

Upon a fair interpretation of the Cherokee agreement of December 19, 1891, ratified by Congress March 3, 1893, the Eastern Cherokees are entitled to a recovery, because the fund claimed was found due in the account rendered as the balance guaranteed them per capita under the 9th Article of the Treaty of 1846 and the United States agreed to pay immediately the sum so found due.

The Eastern Cherokees are entitled to recover the amount claimed by them upon a fair interpretation of

the treaties of 1835-36 and 1846, even if there had been no sale of the Cherokee Outlet and even if there had been no account rendered.

It is conceded by the United States that if the purchase price of $5,000,000 promised the Eastern Cherokees for their lands and possessions east of the Mississippi River, is not chargeable with the cost of removal, then the United States is indebted in the sum now in controversy, to-wit, $1,111,281.70.

The controversy, therefore, turns upon the question as to whether or not the $5,000,000 fund was chargeable with the cost of removal expenses. Before entering upon this question we desire to call attention to the rules laid down by the Supreme Court in regard to the interpretation of Indian Treaties.

In Worcester *v.* Georgia, it was said—

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense * * *.

"How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." (6 Pet. 582.)

In the case of the Kansas Indians (5th Wallace, 737) the following principle was laid down:

Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence a provision in an Indian treaty which exempts their land from 'levy, sale, and forfeiture,' is not in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but it is to be extended to levy and sale by county officers also for non payment of taxes.

In the case of the Cherokee Nation against Georgia, some four years before the treaty of 1835, in speaking of the controversy between the Cherokee Nation and the State of Georgia, the Supreme Court by Chief Justice Marshall said—

"If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence."

"To preserve this remnant the present application is made" * * *

"They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relations to the United States resembles that of a ward to his guardian.

"They look to our government for protection, rely upon its kindness and its power, appeal to it for relief for their wants, and address the President as their 'Great Father.'" (5 Peters 1.)

In the case of Jones *v.* Meehan (175 U. S., 10) Justice Gray delivered the opinion of the court and said:

"In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of

a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed, is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

(See also Choctaw Nation *v.* U. S., 119 U. S., 1, 27, 28).

Justice Peelle has said in this case referring to the principles of interpretation above set forth:

"And such has been the holding of our courts in dealing with the Indian tribes ever since. And especially should this rule prevail where the Indians sign a treaty by mark, as they did in the treaty of 1835, and when the terms of the treaty were made known to them only by the oral interpretation of an interpreter."

The United States Indebted Under the Cherokee Agreement of December 19, 1891.

When the United States established the Territory of Oklahoma it became necessary to extinguish the Indian title to the lands within the boundaries of that Territory. A commission was appointed by authority of Congress, to-wit: David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, who were charged with the duty of negotiating the necessary agreements with the Indian owners. In 1890 the Cherokees refused to sell the Cherokee Outlet because they never had been paid the

full purchase price of the lands they had sold the United States east of the Mississippi. Moreover they were unwilling to sell the lands in the Cherokee Outlet at all because it would only leave them a small allotment of about 80 acres of average land per capita and because the United States offered them a price which they regarded as inadequate. The officers of the United States, however, brought pressure to bear upon the Cherokees very ingeniously. A judicial decision from a local court was rendered that the Cherokees merely had an easement in the lands of the Outlet, the very land President Jackson had pledged them in fee simple, and for which the United States in Article 1 of the treaty of 1846 had pledged them the title and promised a patent, a patent never delivered. The United States Commissioners pointed out to the Cherokees that the United States had a right under the treaty of 1866 to move other Indians into their country. The Cherokees knew the Commissioners were negotiating with the wild tribes in Oklahoma and they were afraid that the United States might take advantage of them by moving strange Indians into their country. The Cherokees were very desirous that the United States relieve them of white trespassers, and, also, recognize the Cherokee courts as having exclusive jurisdiction over all Cherokee citizens.

Under the insistence of the United States Commissioners they finally agreed Dec. 19, 1891, to sell the Outlet, which embraced 8,144,682.91 acres, for six considerations, to wit:

First. That the United States would remove certain described trespassers.

Second. That the Article of the Treaty of 1866 permitting the settlement of other Indians in the Cherokee country should be abrogated.

Third. That the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction where Cherokees alone were concerned.

Fourth. That—

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall, at its next session, after such case, shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting." (Rec. 103.)

Fifth. That certain citizens of the Cherokee Nation should have the right to select lands on the Outlet as homesteads under certain conditions;

Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States should pay the Cherokee Nation, at such times and in such manner as the Cherokee National Council should determine, the sum of $8,595,736.12 in excess of the sum of $728,380.46, the aggregate of amounts theretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River. The Cherokees ratified the agreement January 4, 1892. Congress ratified the same March 3, 1893 (27 Stats., 640).

Chief Justice Nott, in speaking of this negotiation, in the opinion of the Court of Claims, said:

"At the time of this negotiation the Cherokees had a grievance against the United States—a grievance which had burned in the breasts of two generations, and had never been forgiven or forgotten. That grievance was the Treaty of 1835, commonly known as the Treaty of New Echota—the corrupt methods by which it had been procured, the ruthless means by which it had been executed, and the evasive way in which its obligations had been left unfulfilled." (Rec., 44.)

The Cherokees therefore demanded as a **condition precedent** that the account above referred to should be correctly made up and settled in the manner set forth in the Fourth subdivision of Article II of the Cherokee agreement.

Prior to the acceptance and ratification of said agreement on the part of the United States the Commissioners Jerome, Wilson and Sayre made their report to the President, as required by the law under which they were appointed, and explained the reasons why they had agreed that the United States should state the account and the purpose of it, as follows to wit:

"As to the conditions of the agreement, besides the relinquishment of the title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

"The accounting provided for in the fourth subdivision of Article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

"Whatever that construction is, the Indian must abide by it. There is no appeal except to Congress. Without going specifically into details the Cherokees claim that upon a just accounting, upon a proper construction of the treaties named, a large sum of money, **principal and interest,** will be found due them. They also desired to include lands as well as money, but they were induced to eliminate 'lands' from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected." (Rec. 104.)

The Commissioner of Indian Affairs, Hon. Thomas J. Morgan, in his report to the Secretary of the Interior of February 6, 1892, quotes the exact language of the commissioners, thus:—

"The Government has made the accounting, has kept the books, has construed the treaties. If this has been done properly no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for the legal discharge of the old ones. (Rec. 105)

He says:

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it."

The Assistant Attorney General of the Interior Department gave the matter his approval and said that:

"It seems right, and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting." (Rec. 106.)

Thereupon Congress ratified the agreement and provided that:

The provisions of said agreement so amended shall be fully performed and carried out on the part of the United States. (Rec. 106 §7.)

The Congress thereupon threw open the lands of the Cherokee Outlet to settlement. These lands are worth, at a very moderate estimate, not less than sixty millions of dollars.

Congress, at the same time, on March 3, 1893, provided for rendering the account through experts to be employed by the Secretary of the Interior. The Secretary appointed James A. Slade and Joseph T. Bender as expert accountants to make up such account. They completed their labors in about fourteen months and rendered the account, on April 28, 1894. The Secretary of the Interior rendered the account to the Cherokee Nation May 21, 1894, in the manner and form agreed on.

The Cherokee national council accepted it December 1, 1894. (Rec. 51.)

This account allowed the Cherokee Nation "three items of trifling amount," which the United States con-

ceded, and disallowed numerous items which the Cherokee Nation claimed; and on the great and important subject in dispute—the Treaty of New Echota—it found a balance of $1,111,284.70, and allowed interest upon this balance from June 12, 1838. (Rec. 47, 109.)

On January 7, 1895, the Secretary of the Interior submitted the account rendered to the Congress of the United States for payment, describing it as:

"A complete account of moneys due the Cherokee Nation under any of the Treaties made in the years 1817, 1819, 1825, 1835-36, 1846, 1866 and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect, prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of the Cherokee national council accepting such accounting." (Rec. 107.)

This is the money now sued for.

The Court of Claims has heretofore found as a fact (Congressional 10,386) as follows:

10. The accounting as thus stated by Messrs Slade & Bender was rendered to the Cherokee Nation and duly accepted by act of their national council in the manner and form provided in the agreement. (Sen. Doc. 334, 57 Cong. 1st Sess. p. 7. Finding X.)

If ever there was a plain, unequivocal contract, we have it in this agreement.

The United States bought a property from the Cherokees of immense value. They agreed as one of the important considerations by which the Cherokees were induced to make the contract of sale, that the United States would render a complete account of moneys due under any of the treaties with the Cherokees from 1817 to 1868. The United States under this agreement was to render an account using its own instrumentali-

ties. It was understood by the Cherokees that the scope of this accounting was to include the various treaties and laws relating thereto and that a proper accounting should be rendered of the moneys due under those treaties and under a proper construction of those treaties. They complained that these treaties had been improperly construed in the past by the accounting officers of the Government and this accounting was intended by both parties to remedy the injustice complained of by the Cherokees.

The United States appointed expert accountants and by means of its own instrumentalities and its own officers rendered the account. The United States never thereafter objected to the accuracy of the accounting. The United States reserved to itself no right to object to its own accounting in the said Cherokee agreement, but specifically agreed that if it should be found upon its own accounting, to be rendered by its own officers and in its own way, that there had been any sum promised but withheld from the Cherokees under any of the treaties named, the United States would immediately pay it.

The accounting rendered by the United States is one of the most comprehensive, logical and able reports that ever issued from any Department of the Government. It sets forth with the utmost precision the exact terms of the treaties, the exact language of the various officers of the War Department and all the other branches of the Government, and shows the correctness of such account in a manner that can leave not the slightest doubt in the mind of any man, learned or unlearned, as to the correctness of such account. (H. R. Ex. Doc. 182 53rd Cong. 3rd Sess.)

In this report it was not necessary to construe the

law or the treaties, because both the treaties and the laws had been construed by the highest law officers of the Government, and it was only necessary in the making of such accounting to apply the laws as they had been construed by the Attorneys General of the United States. (3 op. 297., 3 op. 304., 4 op. 73., 5 op. 320.)

There assuredly can be not the slightest doubt that the Cherokees understood by the Cherokee agreement and Article 4 of the Second Section thereof that the United States would pay the amount found due by its own accounting. The United States contracted directly and plainly that they would pay the amount found due by their own accounting and, as the Indians understood the agreement, so must the rule of construction be, under the principles laid down by this Honorable Court.

Worcester *v.* Georgia, 6 Pet., 582.
Kansas Indians, 5 Wall., 737.
Jones *v.* Meehan, 175 U. S., 10.

The Court of Claims in the cases now pending (Rec., 49), said:

"It must be conceded that the scope of the accounting was intended to be as broad as the causes of action secured by the agreement to the Cherokee Nation 'The right within twelve months to enter suit against the United States in the Court of Claims for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting.' That is to say, the Court, or the accountants were to go behind statutory and treaty bars and receipts in full and were to consider 'any alleged or declared amount of money promised but withheld' 'under any of said treaties or laws.' This meant that there were to be no technical defenses set

up, no pleas of res adjudicata, no releases or relinquishments, compromises or settlements, or it meant nothing."

The case in controversy is simply one to recover the consideration pledged the Cherokees upon a contract of sale. The Eastern Cherokees as communal owners of the Outlet would not have permitted this sale to be made by the Cherokee Government, of which they had control by reason of their overwhelming numbers, except for the promise of the United States to render a complete account of moneys due the Cherokees under the various treaties and to pay the amount found due them, or in the alternative, permit the Cherokees to bring suit against the United States, if they were not satisfied with the accounting.

The accounting was merely a means to the end. When the account was rendered by the United States in the manner and form agreed on, the indebtedness of the United States was an ascertained and fixed amount. It was due, first, as a consideration moving the Cherokees to the making of the contract of sale of the Cherokee Outlet; it was, as the commissioners explained, a "condition precedent" to the making of the sale at all; but the fund was due the Eastern Cherokees really as the purchase price of their lands east of the Mississippi River, which never had been paid in full and it was due the Eastern Cherokees regardless of the sale of the Cherokee Outlet.

In the opinion of the Court of Claims in this case Chief Justice Nott said:

"No agreement could have made the obligation to pay promptly more unequivocal and specific." * * *

"The accountants were but the instrumentality of the United States in making out an account. When it was

placed in the Interior Department it was as much within the discretion of the Secretary to accept or adopt it, or to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made and he was the authority under which the account had been made out; and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States." (Rec., 51.)

"The Secretary did not recall the account; the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was at the same session, or certainly within the prescribed 'twelve months,' to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time in which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament; and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement." (Rec., 51.)

The amount found due by the accounting rendered by the United States under the Cherokees agreement is due as one of the considerations agreed to be paid by the United States for the making of that agreement and as a consideration pledged by the United States under the provisions of a present valid binding contract.

The United States greatly desired to acquire what the Cherokees owned. The Cherokees refused to sell except upon the making of this account and the paying of any amount found due by such account when rendered. The Cherokees demanded as a condition

precedent that the United States should render the account and pay the amount found due. The United States agreed to do this.

The Cherokees gave up the lands which belonged to them in pursuance of this agreement. The United States appropriated the land and retains it. The Government rendered the account as agreed, the Cherokees accepted it as provided, and it is impossible to present a stronger case of a present valid binding contract. Not to pay the money so found due would violate the canons of common honesty. To refuse payment would be nothing short of the repudiation of an ascertained debt about which there is no question.

In making Cherokee Agreement of December 19, 1891 Cherokee Nation, acted as the Representative of its Citizens.

When the Cherokee Nation required a statement of the amount due its citizens under the various treaties referred to in the Cherokee agreement, it acted as the representative of such citizens as their rights might appear under the various treaties. The Eastern Cherokees naturally and in accordance with a long established custom, were represented by the government of the Cherokee Nation as the instrumentality for dealing with the United States. It should be remembered that the Cherokee Nation as a government owns no lands and no funds derived from the sale of lands. The lands and the funds derived therefrom are the communal property of the Cherokee citizens. (Rec. 52, §2.)

The Cherokee Nation, in receiving the cash consideration of the outlet received it only as the representative of the owners of the lands of the outlet, that is,

for the citizens of the Cherokee Nation, including not only Eastern and Western Cherokees and their descendants, but the Delawares who had been adopted by the Delaware agreement of 1867, the Shawnees who were adopted by the Shawnee agreement of 1869, and the Freedmen who were adopted by the Treaty of 1866.

It is true that the Cherokee Nation as a government attempted to deprive the Delawares, the Shawnees and the freedmen of their proportionate part of the proceeds of the lands of the outlet, but the Congress of the United States and the courts required the proceeds of the outlet to be distributed by the United States to all such citizens of the Cherokee Nation as communal owners of the land from which this cash consideration was derived.

Blackfeather *v.* U. S., 27 Ct. Cls., 447 (175 U. S., 218).
Journeycake *v.* U. S., 28 Ct. Cls., 281 (155 U. S., 196).
Whitmire *v.* U. S., 30 Ct. Cls., 159.

The same principle was recognized by the Court of Claims in the case of the Western Cherokees against the United States (27 Ct. Cls., pages 1 and 53), and in the case of the United States against the Old Settlers (148 U. S., 427), wherein the Western Cherokees were given judgment for the proceeds of the sale of their interest in the lands east of the Mississippi under Article 4 of the Treaty of 1846.

The Eastern Cherokees rely upon the same principle which has controlled in these other cases and demand the sum of $1,111,284.70 as the balance due them under the 9th Article of the Treaty of 1846, and as the remuneration promised them as the purchase price of their communal interest in the lands east of the Mississippi.

The United States Indebted to the Eastern Cherokees Under the Treaties of 1835-36 and 1846, Regardless of the Cherokee Agreement of December 19, 1891.

When the United States acquired the lands known as the Louisiana Purchase from France in 1803 they agreed with Georgia that they would, as soon as practicable, remove the Cherokees from the State. This policy was pursued thereafter until 1838. Negotiations were in progress from time to time urging the Indians to remove from the East to the West, not only the Cherokees but also the Choctaws, the Chickasaws, Creeks and Seminoles.

It was the fixed policy of the United States to pay the cost of the removal of these Indians from the East to the West and to support them for a period of one year after they reached the Western country as shown by the treaties with the Choctaws in 1820 (7 Stats., 210), with the Creeks in 1826 (7 Stats., 381), with the Seminoles in 1832 (7 Stats., 368), with the Delawares and Shawnees in 1829 and 1832 (7 Stats., 327 and 397).

Did the Cherokees understand that the expense of Removal was Chargeable to the $5,000,000 Fund.

The determining question in this controversy is, did the Cherokees understand that the $5,000,000 fund was chargeable with the cost of their removal expense.

Certainly, the Cherokees knew of the general policy of the Government to pay removal expenses in dealing with the adjacent tribes, the Creeks, Seminoles, Choctaws and Chickasaws, Delawares and Shawnees.

The Treaty of 1828 Agrees to Pay Expense of Removal and Subsistence of Eastern Cherokees.

On May 6, 1828, the United States contracted with the Western Cherokees, Article 8 (Rec., 83), as follows (italics our own):

"Article 8. The Cherokee Nation, west of the Mississippi, having by this agreement freed themselves from the harrassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and to their posterity, under the solemn sanction of the guaranty of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their brothers yet remaining in the States may be induced to join them and to enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each head of a Cherokee family now remaining within the chartered limits of Georgia, or of either of the States east of the Mississippi, who may desire to remove West, shall be given, on enrolling himself for emigration a good rifle, a blanket and kettle, and five pounds of tobacco (and to each member of his family one blanket), also a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. *The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation and support by the way, and provisions for twelve months after their arrival at the Agency;* and to each person, or head of family, if he take along with him four persons, shall be paid immediately on his arriving at the Agency and reporting himself and his family or followers, as emigrants and permanent settlers, in addition to the above, provided he and they shall have emigrated from within the chartered limits of the State of Georgia, *the sum of* $50.00, and this sum in proportion to any

greater or less number that may accompany him from within the aforesaid chartered limits of the State of Georgia."

Under this treaty various Eastern Cherokees were leaving [during 1828, 1829, 1830, 1831, 1832, 1833, 1834, and 1835] the Eastern Cherokee country for the West, joining the Western Cherokees, the United States paying the "removal and subsistence" as agreed, it being generally understood by the Indians that the United States would be glad to pay the expense of removal and subsistence of all who would go. These removals at government expense fixed the understanding of the Cherokees.

The great body of the Eastern Cherokees, however, were firmly resolved not to leave their cultivated fields and improvements worth $1,700,144.39 on actual valuation (Rec. 102). They were resolved not to leave the country they loved, where their childhood had been spent, whose hills and valleys were dear to them, a country where they had buried their dead and for which they had the intense affection which has always characterized the Indian. As a matter of common sense, how could these Indian people imagine that they would be expected to pay the expense of removing to the West, a thing to which they were violently opposed? Why should they pay the expense out of their own funds for doing what the United States greatly desired and which was of great political importance to the United States but which was extremely obnoxious to the Cherokees? To pay for their forced removal from homes they did not wish to leave, to go to a country to which they did not wish to go certainly was not agreed to by the Cherokees. The theory is utterly unreasonable.

In the accounting rendered by the United States

April 28, 1894, the expert accountants call attention to the following express proposals by the United States to pay the cost of removal, to-wit:

"In September, 1830, Colonel John Lowry made a proposition to them in behalf of the United States, in which the United States agreed to remove the Cherokees and subsist them one year after their arrival west."

"In April, 1832, Mr. E. W. Chester, in the same behalf, made another proposition under which the United States was to remove the Cherokees to their new country and pay the expense of such removal and also provide them with subsistence for one year after removal."

"In September, 1832, Governor Lumpkin, of Georgia, in the same behalf, made the Cherokees a proposition substantially similar to that of Mr. Chester."

"June 19, 1834, a treaty was made between John H. Eaton, on the part of the United States, and Andrew Ross, and others, on the part of the Cherokee Nation. This treaty was rejected by the Senate, the Cherokee Nation protesting against its ratification. In this treaty appears the following clause, respecting removal and subsistence:

"Fourthly. To cause emigrants to be carried to their homes under the guidance of some faithful conductors at the expense of the United States, and they are furthermore, to be furnished with the means of living for twelve months after their arrival." (H. R. Ex. Doc. 182, 53 Cong., 3 Sess.) Ex. 1. A. 19.

The Award of March 5, 1835 of U. S. Senate.

On March 5, 1835, the Senate of the United States, acting as umpire, upon the suggestion of the War Department, made an "award" in favor of the Cherokees in the form of a resolution advising:

"That a sum not exceeding $5,000,000 be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River."

John Ross, the Cherokee Chief, bitterly complained of this award on the ground that the Cherokee authorities were not heard in regard to it and that the Senate had been grossly misled by the representation and suggestions of certain unauthorized Cherokee citizens unduly influenced by officers of the Government. The Cherokees valued their country at $20,000,000.

Rev. J. H. Schermerhorn, a commissioner appointed to make a treaty with the Cherokees, immediately drew up a proposed treaty on March 14, 1835, in which in Article 9 it was proposed as follows:

"The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after arrival there, and that a sufficient number of steam boats and baggage wagons shall be furnished them to remove them comfortably, and so as not to endanger their health; and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the government. They shall also be furnished with blankets, kettles and rifles as stipulated in Treaty of 1828. * * * And in order to encourage immediate removal and with the view of benefitting the poorer class of their people the United States agree and promise to pay each member of the Cherokee Nation $150.00 on his removal, at the Cherokee Agency West, provided they enroll and remove within one year from ratification of this treaty; and $100.00 to each person that removes within two years." (Ibid.) 4/1 f 20,

This proposal provided for the payment of $4,500,000, with an additional quantity of land west, valued at $500,000, making a total payment of $5,000,000, from which certain estimated expenses for removal, subsistence, improvements, and ferries, and other expenditures were to be deducted. Forming a part of Article 18 is the following schedule containing the estimate for

carrying into effect the several stipulations of the treaty:

For removal	$255,000.00
Subsistence	400,000.00
Improvements and ferries	1,000,000.00
Claims and spoliations	250,000.00
National debts	60,000.00
Domestic animals	10,000.00
Public buildings	30,000.00
Printing press	5,000.00
Blankets	36,000.00
Rifles	37,000.00
Kettles	7,000.00
Per capita allowance	1,800,000.00
General fund	400,000.00
School fund	160,000.00
Orphans' fund	50,000.00
Additional territory	500,000.00
Total	$5,000,000.00

(Ibid 15.)

President Jackson's Letter October 23, 1835.

This proposal was submitted to the Cherokee people at a general Council at Red Clay on the 20th day of October, 1835. A letter from President Jackson explanatory therof was read and translated to the Council, in which he said:

"I shall, in the course of a short time, appoint commissioners for the purpose of meeting the whole body of your people in Council. They will explain to you more fully my views in the matter of the stipulations which are offered to you. These stipulations provide:

"First, for an addition to the country already assigned to you west of the Mississippi and for the conveyance of the whole of it, by patent in fee simple. And also for the security of the necessary political rights, and

for preventing white persons from trespassing upon you.

"Second. For the payment of the full value to each individual for his possessions in Georgia, Alabama, North Carolina and Tennessee.

"Third. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of $150.00 to each person, etc." (Sen. Doc. 215, 56 Cong., 1st Ses., 82.)

The proposed treaty was nevertheless unanimously rejected by the Cherokee National Council. Even those who had agreed to treat refused this proposition of Schermerhorn to charge the Cherokees with a part of the expense of removal. (Rec., 85.)

At the time of the rejection of this proposed treaty John Ross and the Cherokee authorities, insisted that their country was worth at least $20,000,000, the country itself being splendidly adapted for agriculture, finely watered, with splendid timber and inexhaustible quantities of marble, iron and other minerals, and at that time also being regarded with great excitement on account of the gold diggings which had been found in a number of places. (Sen. Doc. 120, 25 Con., 2d Ses., 494. History Cherokee Indians, Bureau of Ethnology 378. H. R. Ex. Doc. 286, 24th Cong., 1 Ses., 13.) The country contained 7,882,240 acres.

The Cherokee title was recognized by the Supreme Court. (5 Peters, 1 and 6 Peters, 516.)

Treaty of December 29, 1835.

Immediately that Mr. Schermerhorn failed in carrying out the treaty, he wrote the Commissioner of Indian Affairs, October 27, 1835 (Sen. Doc. 120, 25 Con., 2d Ses., p. 484):

"The only hope I have of accomplishing it now is the

fear of the Indians of Georgia legislation. Alabama and Tennessee, I think, will also pass some wholesome laws to quicken their movements."

The cruelly oppressive laws passed by Georgia over the Cherokees, in defiance of Federal Treaty and this court is fully set out in Cherokee Nation *v.* Georgia (5 Pet. 1, 6 Pet. 516.)

President Jackson instructed Schermerhorn not to use unfair means. But Schermerhorn not only used the legislatures of the adjacent States to violate the pledges of the Federal Government to these Indians, but he told the Indians themselves that their country had:

"Already been virtually sold by the Chiefs." (Sen. Doc. 120, 25 Cong. 2d Ses., 461.)

Schermerhorn immediately disobeyed the President and bribed the Indians by promises of blankets and other benefits, and persuaded them to attend a mass meeting at New Echota where he secured the signatures or marks of twenty Cherokees to the so-called Treaty of December 29, 1835. Mr. Schermerhorn, on December 31, 1835, made the following report:

"The whole of the expenditures since I have been in the Nation negotiating, not including my own services, etc., or that of the Secretary, amounting to about $3,000; and I believe all the accounts are in and settled up to this day, having made myself personally responsible to the disbursing agent for all advances above the money in his hands, for this service." (Sen. Doc. 120, 25 Cong., 2d Ses., p. 496.)

Mr. Schermerhorn made this false report when, as a matter of fact, he had contracted to pay every man who signed his pretended treaty sums ranging from $1,200 to $2,760 for their "services and expenses" in negotiat-

ing and concluding the Treaty of 29th December, 1835, amounting to over $30,000 as follows, to wit:

J. Star	$1,681.00	W. Rogers	1,310.00
A. Ross	2,760.00	R. Sanders	1,200.00
J. A. Foreman	1,315.00	Tayeskey	1,200.00
J. Gunter	1,315.00	J. Foster	1,200.00
Longshell Turtle	1,315.00	J. Fields	1,300.00
J. Rogers	2,175.00	M. Ridge	1,280.00
John Smith	2,175.00	G. Welch	1,200.00
W. Coody	1,407.00	J. Ridge	2,054.87
E. Boudinot	1,550.00	S. Watie	1,200.00
J. Bell	1,200.00		

Schermerhorn acted personally as attorney for Boudinot, Bell, Tayeskey, Foster, Fields, M. Ridge, G. Welch, J. Ridge, S. Watie, J. Fields, and he received for them over $16,000. (Ibid. 1034.)

The error of these poor Cherokees led to their immediate outlawry and to the bloody assassination of many of them.

In extenuation of their error it should be remembered that the oppression of the laws of Georgia was driving the unhappy Cherokees to desperation and those who favored making a treaty and moving West had grounds to believe it was best for the Cherokees to yield when the United States refused to protect them in their guaranteed treaty rights.

The history of this corrupt transaction is set forth in the Western Cherokee case by the Court of Claims, vol. 27, pp. 20-30, and in Senate Doc. 392, 56th Cong., 1st Ses., pp. 5-10.

On the 3d of February, 1836, the General Council of the Cherokee Nation, the Eastern Cherokees, unanimously adopted a resolution setting forth:

"That having been informed that certain individuals of the Cherokee Nation, after having organized them-

selves into a body and calling themselves a General Council, did, on the 28th or 29th of December last, at New Echota, enter into an agreement or treaty with John F. Schermerhorn, Commissioner on the part of the United States, ceding away the entire land of the Cherokee Nation east of the Mississippi to the United States, contrary to the known will and declaration of a large majority of the Cherokee people and without any authority whatever from the authorities and people of the Cherokee Nation so to act."

Wherefore the resolution proceeds:

"We do most solemnly protest before God and man and of its ratification by the Senate of the United States that we are determined never to acknowledge any acts of individuals without authority to treat away the most sacred rights and the dearest interest of the Cherokee people."

The Court of Claims has held as a finding of fact in regard to this treaty of New Echota as follows:

"Neither the 'Western Cherokees' or 'Old Settlers,' nor the great body of the 'Eastern Cherokees' were parties to this treaty, and they at all times up to the making of the Treaty of 1846 repudiated it on the ground that its execution had not been authorized by them or their representatives in Council." (Rec. 93.)

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Immediately after the treaty had been framed and before it had been submitted to the Senate some of the men who were bribed to sign it discovered that Article 15 of that treaty included the expense of removal as a deduction from the five million fund and they immediately protested that they had not so understood the treaty.

It should be remembered, in considering this claim made by them, that Schermerhorn was corrupt, that he was determined to make a treaty at all hazards, that

the interpreter who was in his employ might easily have omitted the word "removal" and it might easily happen that Schermerhorn, being corrupt, in reading Article 15 could have read it so as to omit the word "removal." It might easily have happened that Schermerhorn, being corrupt, might have left a blank space in Article 15 where the word "removal" might be thereafter inserted in the same handwriting. 7 U. S. Statutes has a note, referring to this treaty, that these Indians signed this treaty by mark, and it would not be surprising if advantage might have been taken of them in the particular named. At all events they immediately insisted that they understood that removal expenses were not to be deducted from the five million fund and they were confirmed in their opinion by various authorities.

Senator Cuthbert and other Senators who voted for the ratification of the treaty, wrote the following letter to the President of the United States:

"February 29, 1836.

"We have no hesitation in stating it to be our impression, sir, that the Senate of the United States did not intend that the allowance for spoliation or the expenses of removal should be deducted from the amount of five millions recommended to be offered to the Cherokees as the price of their property. It is also our confident opinion that the Senate will readily add six hundren thousand dollars to the sum of five million to meet these two expenditures.

"With the greatest respect, &c."

"To the President of the United States."

(H. R. Ex. Doc. 182, 53 Cong., 3 Ses. 17.) 41, p. 11,

The War Department, through its Commissioner Schermerhorn, estimated:

The cost of removals at	$255,000
And for claims and spoliations	250,000
Aggregating	$505,000
This would leave for school purposes	95,000
Out of the	$600,000

which was by the supplementary articles agreed on.

It should be remembered that when this treaty was ratified there was no intention to remove the entire Cherokee people. The policy of removing all the people was only determined on after the conflict between the government and the Cherokee Indians had progressed nearly two years.

Decision of Senate in 1836 on Removal Expenses.

The President of the United States, evidently believing that the Cherokees were justified in their contention that the purchase price of the land, the five millions, was not to be charged with the expense of removal, drew up and submitted four supplementary articles which were submitted to the Senate with the Treaty March 1, 1836.

Article 1 relinquished certain preemption rights and reservations. Articles 2 and 3 are as follows:

"Article 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States,

which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question; and whereas the President is willing that this subject should be referred to the Senate for their consideration and if it was not intended by the Senate that the above mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provision should be made therefor as might appear to the Senate to be just.

"Article 3. It is therefore agreed that the sum of six hundred thousand dollars shall be and the same is hereby allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the reservations and preemptions and of the sum of three hundred thousand dollars for spoliations described in the 1st Article of the above mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after the removal and payment of the claims so ascertained shall be turned over and belong to the education fund." (7 Stat. L., 488.) (Rec. 87.)

It is perfectly obvious that the treaty making Indians understood that the five million fund should not be charged with the cost of removal.

It is equally plain that the Senate of the United States understood that the five million fund was not to be charged with the expense of removal. It was only **"in that case"** that the Senate was to make "such further provision" for removal expenses "as might appear to the Senate to be just."

The Senate thought it just to appropriate six hundred thousand dollars, an amount estimated as more than sufficient to pay the entire cost of removal. If the Sen-

ate thought it just to pay the entire cost of removal and if they made provision to pay the entire cost of removal on the theory that the five million fund was not chargeable with the expense of removal who shall be heard to construe the treaty to mean the exact contrary of what the Senate declared as its intention and what the Indians declared to be their understanding?

Nothing could be more convincing as to the intention of the parties than this construction put upon the treaty before its ratification and with this construction written into the treaty as the last expression of the legislative will in the supplementary articles. The treaty with these supplementary articles was ratified by the Senate May 18, 1836, and proclaimed May 23, 1836.

Long afterwards, on June 14, 1848, the Senate of the United States was discussing the history of this treaty and the Senators of Tennessee, of North Carolina, and of South Carolina, the States immediately concerned in the Cherokee removal, explained its meaning. Senator Bell of Tennessee, (Cong. Globe, p. 840) said that the Senate had determined that the cost of removal should not be deducted from the five million dollar fund; that by making an additional appropriation for the cost of removal and subsistence, the Government of the United States admitted that this expense was not to be taken out of the five million dollar fund; that in addition to this the Government had pledged itself two years after the ratification of the treaty to pay the whole expense of removal and subsistence; that the claim of the Cherokees that the Government was chargeable with the entire cost of removal and subsistence was equitable.

Senator Willie P. Mangum representing North Carolina, acquiesced in the exposition of Senator Bell as conclusive. He stated that the vote on the ratification was

30 to 15, actually a majority of one under the two-thirds rule. He had been induced to give his vote for the ratification, which he did very reluctantly knowing that it could not be ratified without his vote, and he would never have given his vote for it had he not been satisfied that the true construction was that which had been given by the Senator from Tennessee. That he had voted for the treaty to save the Cherokees from the sword of Georgia.

Senator John C. Calhoun recollected the circumstances attending the ratification of the treaty generally, although he did not remember the particular incident alluded to by Senator Mangum but he had no doubt of the entire correctness of it. He had never regarded the treaty as a treaty at all.

Congress Confirms Decision of Senate on Question of Removal Expense July 2, 1836.

On July 2, 1836, the Congress of the United States sanctioned and confirmed the construction of the United States Senate that removal expenses should be paid from the Treasury of the United States and not from the five million fund by passing the following appropriation act:

"For the removal of the Cherokees and for spoliation according to the 3rd Article of the supplimentary treaty with the Cherokees, of the first of March, one thousand eight hundred and thirty-six, six hundred thousand dollars." (5 Stats. 73.)

On July 2, 1836, the Congress of the United States appropriated the five millions of dollars pledged to the Cherokees for their "lands and possessions" in the following act:

"For the amount stipulated to be paid for the lands

ceded in the first Article of the Treaty with the Cherokees of the twenty-ninth of December, one thousand eight hundred and thirty-five, deducting the cost of the land to be provided for them west of the Mississippi, out of the second Article of said Treaty four million five hundred thousand dollars." (5 Stats. 73.)

From 1836 to 1838.

The Eastern Cherokees vigorously protested against the execution of the so-called treaty of 1835. They were not parties to it and did not believe that the United States would attempt to carry it out.

On March 5, 1836, Major William M. Davis, an agent of the War Department in the Cherokee country, made the following report to the Secretary of War:

"I conceive that my duty to the President, to yourself, and to my country reluctantly compels me to make a statement in relation to a meeting of a small number of Cherokees at Echota last December who were met by Mr. Schermerhorn and articles of a general treaty entered into between them for the whole Cherokee Nation * * *.

"I should not interpose in the matter at all, but I discover that you do not receive impartial information on the subject; that you have to depend upon the ex parte, partial, and interested reports of a person who will not give you the truth. I will not be silent when I see that you are about to be imposed on by gross and base betrayal of the high trust reposed in Rev. J. F. Schermerhorn by you * * *.

"Sir, that paper * * * called a treaty is no treaty at all because not sanctioned by the great body of the Cherokees and made without their participation or assent. I solemnly declare to you that upon its reference to the Cherokee people it would be instantly rejected by nine-tenths of them, and, I believe, by nineteen-twentieths of them. There were not present at the conclusion of the treaty more than one hundred Cherokee

voters, and not more than three hundred including women and children, although the weather was everything that could be desired. The Indians had long been notified of the meeting, and blankets were promised to all who would come and vote for the treaty. The most cunning and artful means were resorted to to conceal the paucity of numbers present at the treaty," &c.

"The Cherokee people are a peaceable, harmless people, but you may drive them to desperation; and this treaty cannot be carried into effect except by the strong arm of force.

"With very great respect,

"I have the honor to subscribe myself

"Your most obedient servant,

"WM. M. DAVIS.

"Hon. Lewis Cass,

"Secretary of War, Washington City."

Brigadier General R. G. Dunlap, in a speech to his brigade September, 1836, at their disbandment, said:

"I forthwith visited all the posts within the first three States and gave the Cherokees (the whites needed none) all the protection in my power * * * My course has excited the hatred of a few of the lawless rabble in Georgia, who have long played the part of unfeeling petty tyrants, and that to the disgrace of the proud character of gallant soldiers and good citizens. I had determined that I would never dishonor the Tennessee arms in a servile service by aiding to carry into execution at the point of the bayonet a treaty made by a lean minority against the will and authority of the Cherokee people * * * I soon discovered that the Indians had not the most distant thought of war with the United States notwithstanding the common rights of humanity and justice had been denied them." (History Cherokee Indians, Royce, 286.)

General John E. Wool, U. S. Army, February 18, 1837, wrote Adjutant General Jones at Washington as follows:

"I called them (the Cherokees) together and made a short speech. It is, however, vain to talk to a people almost universally opposed to the treaty and who maintain that they never made such a treaty. So determined are they in their opposition that not one of all those who were present and voted at the council held but a day or two since, however poor or destitute, would receive either rations or clothing from the United States lest they might compromise themselves in regard to the treaty. These same people, as well as those in the mountains of North Carolina, during the summer past preferred living upon the roots and sap of trees rather than receive provisions from the United States, and thousands, as I have been informed, had no other food for weeks."

Four months later General Wool said:

"Had Curry lived he would assuredly have been killed by the Indians. It is a truth that you have not a single agent, high or low, that has the slightest moral control over the Indians. It would be wise if persons appointed to civil stations in the nation could be taken from among those who have had nothing to do with making the late treaty." (Ibid 290.)

The Cherokees made numerous protests as set out in Senate Document 392, 56th Cong., 1st Ses., p. 8, etc.

To-wit, on March 8, 1836, H. R. Doc. 286, 24 Cong. 1st Ses., V. 7.

June 21, 1836, H. R. Doc. 286, 24th Cong., 1st Ses., V. 7.

September 28, 1836, H. R. Doc. 99, 25th Cong., 2d Ses. V. 5, p. 10.

September 30, 1836, H. R. Doc. 99, 25th Cong., 2d Ses., V. 5, p. 7.

December 8, 1836, H. R. Doc. 99, 25th Cong., 2d Ses., V. 5, p. 14.

Feby. 22d, 1837, H. R. Doc. 99, 25 Cong., 2d Ses., V. 5, p. 4.

December 15, 1837, H. R. Doc. 99, 25 Cong., 2d Ses., V. 5, p. 1.

August 8, 1837, H. R. Doc. 99, 25 Cong., 2d Ses., V. 5, p. 15.
March 16, 1837, H. R. Doc. 99, 25 Cong., 2d Ses., V. 5, p. 18.
Feby. 28, 1838, H. R. Doc. 316, 25 Cong., 2d Ses., V. 9.
June 9, 1838, H. R. Doc. 129, 26 Cong., 1st Ses., p. 29
June 11, 1838, H. R. Doc. 129, 26 Cong., 1st Ses., p. 31.
July 12, 1838, H. R. Doc. 129, 26 Cong., 1st Ses., p. 34.
August 1, 1838, H. R. Doc. 129, 26 Cong., 1st Ses., p. 37.

The sum and substance of these petitions is to set forth the fact that the Cherokees under the treaties with the United States owned the country they occupied and lawfully possessed their property. That the Supreme Court had so declared; that the Federal Government was obliged by treaty to protect them in their rights; that Georgia had determined to deprive them of their rights, of their country, and of their personal property, and of their liberty, and that their appeals to the President had been in vain; that the Treaty of 1835 was made in defiance of the laws and customs of the Cherokees by a few unauthorized individuals; that it was not made by the Cherokee people; that it was not consented to by them; that it was a fraud upon the United States and upon the Eastern Cherokees and that they never would consent to it no matter how disastrous the consequences might be. In the Memorial of March 8, 1836, they explained how the Senate had been misled to the prejudice of the Cherokees in awarding only five millions as the value of the Cherokee country which they held at a minimum value of twenty millions, embracing as it did seven million, eight hundred and eighty two thousand, two hundred and forty acres. In this memorial they set out at great length the details of oppression, threats, violence, arrest, and

imprisonment, with a history of how the pretended treaty was made and they conclude as follows:

"The delegation are sure it cannot be the wish of the Senate of the United States to ratify and have enforced upon the unoffending Cherokee people a treaty made without their authority, false upon its face and against the known wishes of the Nation. Such is the instrument submitted to your honorable body for the truth of the statement, should the Senate require further proof, it can be obtained from numerous persons of unimpeachable integrity and veracity. But if it be the fate of the Cherokee people, and the decree has gone forth that they must leave their homes and native land and seek a new residence in the wilds of the Far West, without their consent, let them be expelled and removed by an Act of Congress, that they or their posterity in after times may have some claims upon the magnanimity of the American people.

"The delegation do solemnly declare that they would consider such an act preferable and more humane than the ratification and enforcement of a fraudulent treaty, false upon its face, and made without the consent of one of the professed contracting parties. The past history of the United States furnishes admonition against the ratification of treaties made with unauthorized individuals. Resting upon the sacred rights of the Cherokee Nation so often recognized, and solemnly guaranteed on the faith of treaties, the delegation now appeal to the sympathies, the honor, the good faith and magnanimity of the United States to preserve and protect their Nation from fraud, rapine, plunder, and destruction. * * * We are all children of the same great Parent and bound to be kind to each other without regard to the situation in which we may be placed. If an earthly parent have a child unfortunately weak and poor, how would he feel to see the brothers of that child abusing it for its misfortunes, insulting its feelings, exulting in their own superiority, curling the lip of scorn with significant cant of the head at its earnest supplications for justice? Let every man's own heart

give him the answer. You have before you that unfortunate child in the weak and dependent Cherokees.

"With hands elevated toward the Throne of Grace and Mercy we all supplicate, saying:

" 'Our brothers, is it true you will drive us from the land of our nativity and from the tombs of our fathers and our mothers? We know you possess the power, but by the tie that unites us yonder, we implore you to forbear.' "

These are the people who are charged now by government counsel with having agreed by treaty to pay for the cost of their own removal.

On December 15, 1837, in a Memorial, the Eastern Cherokees said to Congress:

"We complain of sending among us a large armed force, of the attempt made to prevent the expression of opinion among us, of the arrest and imprisonment of our persons, of the expulsion of our people from their homes; for which even the document in question furnishes no ground or cause. All these, however, sink into insignificance when compared with the one overwhelming calamity, present and prospective, of having the instrument of December, 1835, enforced upon us and our people." (Rec., 45.)

In a remarkable petition submitted to Congress bearing the date February 22, 1838, signed by 15,665 of the Cherokee people the whole nation reiterated "we do solemnly and earnestly protest against that spurious instrument." (Rec., 45.)

Forced Removal in 1838.

On April 6, 1838, Major General Alexander McComb, Commander-in-Chief, directed Major General Winfield Scott to prepare to remove the Cherokees by military force as—

"It is apprehended that the mass of the Nation, under some delusion does not intend to remove to the country provided for them under the stipulations of the treaty entered into with them on the 29th of December, 1835." (H. Ex. Doc. 453, V. 2, 25 Cong., 2d Ses.)

On May 10, 1838, Major General Winfield Scott placed the Cherokees in a state of capture and issued to them the following address:

"Cherokees: The President of the United States has sent me with a powerful army to cause you, in obedience to the Treaty of 1835, to join that part of your people who are already established in prosperity on the other side of the Mississippi. * * *.

"I am come to carry out that determination. My troops already occupy many positions in the country that you are to abandon and thousands and thousands are approaching from every quarter to render resistance and escape alike hopeless. All those troops, regular and militia, are your friends. Receive them and confide in them as such. Obey them when they tell you that you can remain no longer in this country. Soldiers are as kind-hearted as brave, and the desire of every one of us is to execute our painful duty in mercy. We are commanded by the President to act towards you in that spirit, and such is also the wish of the whole people of America.

"Chiefs, headmen, and warriors, will you, then, by resistance compel us to resort to arms? God forbid. Or will you by flight seek to hide yourselves in mountains and forests, and thus oblige us to hunt you down? Remember that in pursuit it may be impossible to avoid conflicts. The blood of the white man or the blood of the red man may be spilt and if spilt, however accidentally, it may be impossible for the discreet and humane among you or among us to prevent a general war and carnage. Think of this, my Cherokee brethren. I am an old warrior and have been present at many a scene of slaughter; but spare me, I beseech you, the horror of witnessing the destruction of the Cherokees."

The entire correspondence between General Scott and the Eastern Cherokees is set forth in Sen. Doc. 392, 56 Con., 1 Ses., 33-39.

Executive Construction on Removal Expense 1838.

On May 18, 1838, the Secretary of War in a letter to John Ross, the principal Chief of the Cherokees, and his delegation, refused to negotiate a treaty with them upon which they could stand, but in his letter said (italics ours):

"If it be desired by the Cherokee Nation that their own agents should have charge of their emigration their wishes will be complied with and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect. *With regard to the expense of this operation, which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted and an application for such further sum as may be required for this purpose shall be made to Congress.*"

This letter was submitted by the President to Congress immediately and on the 23rd of May the House of Representatives passed a resolution requiring an estimate for the amount needed for the removal and subsistence of the Cherokees according to the purport of this letter.

Thereupon the estimate of the War Department was submitted to the Congress of the United States in the following communication:

"Department of War, May 25, 1838.

"Sir:

"In compliance with a resolution of the House of Representatives of the 23rd instant, requiring a statement of the amount that will be required for the addi-

tional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

Payment of the expenses of removing the remaining Cherokees estimated at 15,840, at $30 per head.....	$475,200.00
Amount applicable to that purpose.....	39,300.00
Balance to be provided for.....	$435,900.00
If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated, viz., $33.33 a head	611,105.55
Add for contingencies, under estimate both of the number to be removed and of expenses to be incurred.....	100,000.00
The amount of annuities, payment of which is asked for by the deputation, will be	33,330.00
	$1,180,335.55

Very respectfully
Your obedient servant,
J. R. POINSETT.

To Hon. J. L. Polk,
Speaker House of Representatives."

Legislative Construction of Removal Expense 1838.

On June 12, 1838, the Congress of the United States made the appropriation estimated for in the following language: (Italics our own.)

"Sec. 2. And be it further enacted, that the further sum of one million forty seven thousand and sixty-seven dollars be appropriated out of any money in the treas-

ury not otherwise appropriated, in full, for all objects specified in the third article of the supplementary articles of the treaty of 1835 (*removal expense*) between the United States and the Cherokee Indians and for the *further object of aiding in* the subsistence of said Indians for one year after their removal West; *provided, that no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty.*" (5 Stats. 242.)

Assuredly if this language meant anything it meant that the authorities of the United States, both the President and the Congress, believed that the cost of removal and subsistence was to be borne by the United States out of its own treasury. There is not the slightest doubt that the Indians understood this and that they had no idea that they would ever be asked to pay for the cost of removal out of the small sum allowed them for their eastern country.

When Secretary J. R. Poinsett made the proposition to John Ross that the United States would defray the expenses of the removal of the Eastern Cherokees he wrote General Scott immediately as follows:

War Department, May 23, 1838.

"Sir:

You will receive herewith a copy of proposals (already communicated to Congress by the President) made by the Department to the Cherokee delegation now in this city, which it is believed will be accepted by them. You are therefore hereby authorized to enter into an agreement with the agent of the Nation for the removal of their people. The expenses attending the emigration of the Cherokees are now fully ascertained by past experience; and it is presumed you will find no difficulty in making such arrangement as, while it will secure their comfortable removal in the manner most agreeable to their chiefs and head men, will effectually protect the interests of the United States and prevent

all unnecessary delay or useless expenditures." (Sen. Doc. 392, 56 Cong., 1st Ses., p. 11.) (Rec. 89.)

In the account rendered by the United States (Slade-Bender) it was found that the removal of those who emigrated voluntarily under the government officers prior to this date, had cost $61.70 per capita and there was no reason to believe that it could be done more economically. (H. R. Ex. Doc. 182, 53rd Cong., 3rd Ses., p, 10.) Ex. 1 p. 13.

The fact is it cost the Cherokees much more than this to-wit: $103.25. General Scott explained why it cost so much more in his testimony (H. R. Rep. 288, 27 Cong. 3d Ses., p. 37) as follows:

"The drouth that nearly desolated so many States in 1838 commenced in the Southwest at the end of May and continued into October. During the latter eight or ten weeks of its continuance it would have been impossible for a detachment of 100 Indians, with their horses, to have found water on the land routes for many and many marches together; hence all the subsequent difficulties and embarrassments in my plans and the emigration itself; for, but for the drouth, I would have quashed the contract with Lewis Ross as extravagant, and the renewed movement beginning with September would have escaped ice, snow, and bad roads, and been ended in 80 days by each detachment. The drouth was a calamity to the country generally, and particularly so to the poor Cherokees."

On July 21, 1838, the Cherokee Council in General Scott's camp at Aquohee resolved to undertake the emigration of themselves and state in that resolution in the preamble as follows: (Italics ours.)

"And whereas our delegation has just returned from Washington city, and having important suggestions to make to the Commanding General, *under a special understanding with the Honorable Secretary of War, in*

reference to the removal of the Nation to the West, have submitted the matter to this council for advice."

Accordingly on July 26, 1838, the Cherokee Council authorized John Ross and his associates as follows: (Italics ours.)

"They are hereby authorized and fully empowered to make and enter into any and all such arrangements with Major General Scott on the part of the United States which they may deem necessary and proper for effecting the entire removal of the Cherokee people from the East to the West of the Mississippi River, and also to enter into such further arrangements with the Commanding General *in relation to the payment of such sums of money by the United States* as may be necessary for the removal and subsistence of all the Cherokee people."

This limited resolution is the only authority the Cherokees gave to John Ross to receive money from the United States on account of removal, and that authority was given only for the payment of money by the United States on account of such removal and under the special understanding with the Secretary of War that the expense of removal should be defrayed by the United States.

Assuredly the Eastern Cherokees not only believed that the United States was fully bound to pay the entire cost of removal but they had a right to so understand it since the officers of the government, the President, the Secretary of War, and the Senate and the House of Representatives equally well so understood it.

The United States through its local agents in the Cherokee Nation continued to advise the Cherokees that the United States would pay the cost of their removal and subsistence, and would pay them a per capita of $150 besides. This appears in the instructions

sent by the Acting Secretary of War C. A. Harris to Lieutenant J. Van Horne, U. S. A., Sept. 12, 1837, who was directed to enroll the Cherokees where they could be induced to agree to remove in the following instruction:

"Enrolling books must be prepared on the following plan: A memorandum or entry must be inserted, purporting that the subscribers assent to a treaty with the United States upon the terms heretofore offered by the President to their people. And that if no treaty should be made during the next fall, or early in the winter, then the subscribers will cede to the United States all their right and interest in Cherokee lands east of the Mississippi upon the following conditions: That they shall receive, so fast as Congress shall make the necessary appropriation, the ascertained value of their improvements, on their arrival West; that they shall be removed and subsisted for one year at the expense of the United States," etc., etc. (H. R. Ex. Doc. 182, 53rd Cong. 3 Ses. 16.)

It will be remembered that the President in his letter read to the Cherokees October 23, 1835, at the Council of Red Clay had promised them that the United States would pay the cost of removal and subsistence and a per capita of $150 to each Cherokee who removed West. (Rec., 85.)

In the present suit the Court of Claims finds as a matter of fact the Eastern Cherokees were paid only $56.31 per capita excluding interest, and if they should be paid the sum they now claim would only receive $124.78 per capita excluding interest. (Rec., 109.)

In the account rendered by the United States under the Cherokee agreement ratified March 3, 1893, the following statement appears (italics ours):

"It seems to have been the opinion of the War Department as late as November 18, 1836, that the above

article (Art. 8, Treaty 1828) obliging the United States to pay the cost of the removal and subsistence of Eastern Cherokees (moving West), was not superseded or annulled by the Treaty of 1835. On that date Mr. Commissioner Harris wrote Major B. F. Currey, Indian Agent, in the Cherokee country as follows:

" 'Sir:

" 'I acknowledge the receipt of your letter of the 26th of October last, and in reply have to observe that I have taken the decision of the Secretary of War ad interim upon the claim of the Cherokees to commutation for subsistence, at $33.33 each. The Secretary decides that the commutation may be paid at the rate above stated; but at the same time declares that the allowances are made *under the Treaty of* 1828 and not in pursuance of any stipulation of the final Treaty of 1835.'

" 'The *same opinion* has been held in various reports to the Senate and House of Representatives from the Committees on Indian Affairs. Without quoting from them at length the following extract, from report dated February 19, 1847, by Mr. Jarnigan, gives substantially the view which has been expressed in various forms in the reports referred to:

" 'The sole consideration stated for the five millions was their lands and possessions East of the Mississippi River. If anything else had been intended to be included, such as claims for spoliation, subsistence, removal, etc., why was it not so stated in the Treaty? It is enough to show that it is not so stated; but it is manifest that such was not the intention of the parties; for the amount of these spoliations, the expense of removal, etc., were not then known, and could not have been ascertained; and besides, these were subsisting claims upon the government of the United States which they were bound by the treaty to have paid, not to pay them, or to pay them out of the funds of the Cherokees which had been fixed by the Senate as the value of their lands, *was precisely the same thing.*

" 'The United States were bound by the Treaty of 1828 to pay the expenses of the removal of all the Cher-

okees. This obligation was not released by the purchase of their lands at their appraised value. Would such a thing be pretended in a similar transaction between individuals? If all the Cherokees had removed before they ceded their lands, the United States were bound to pay the cost of removal. If the United States afterward bought the lands of the Cherokees, they were bound to pay the price at which they were appraised." (H. R. Ex. Doc. No. 182, 53d Cong., 3d Ses., p. 12.) 4.1.16,

The War Department having determined to remove the Cherokees in May of 1838, sent Captain John Page as disbursing officer and placed in his hands a large fund taken out of the five million dollar fund and thereupon there was disbursed from the five million dollar fund on account of removal expenses the sum of $1,111,284.70, which has never been reimbursed the five million dollar fund.

Captain John Page made the following payments to John Ross on account of these removal expenses out of the five million dollar fund, although Ross appears to have had no means of knowing the source from which the fund was drawn. He had a right to believe it was taken from the fund appropriated by Congress for removal expenses June 12, 1838, to wit:

August 4, 1838	$130,000.00
September 17, 1838	134,960.00
October 16, 1838	264,960.00
November 13, 1838	264,479.04
	$776,399.04

Report from Second Auditor's Office, August 16, 1842 (H. R. Rep. 108, p. 68).

The Constitution and Statutes Violated in Taking the Trust Fund for Removal Expenses.

The Constitution of the United States provides that: "No money shall be drawn from the Treasury but in

consequence of appropriation made by law. (Article 1, Sec. 9, Clause 7.)

And that all appropriations acts must originate in the House of Representatives.

The Act of Congress of March 3, 1809 (2 Stats., 535), provides:

"That all warrants drawn by the Secretary of the Treasury of the United States shall specify the particular appropriation or appropriations to which the same shall be charged. The money paid by virtue of such warrants shall in conformity there with be charged to such appropriation or appropriations in the books kept in the office of the Comptroller of the Treasury, in case of warrants drawn by the Secretary of the Treasury, and in the books of the accountants of the War and Navy Departments respectively, in case of warrants drawn by the Secretary of War or the Secretary of the Navy; and the officers, agents or other persons who may be receivers of public moneys shall render distinct accounts for the application of such moneys according to the appropriation or appropriations under which the same shall have been drawn."

The only appropriation act relating to the five millions of dollars was the act of July 2, 1836, as follows: (5 Stats., 73.):

"For the amount stipulated to be paid for the lands ceded in the first article of the treaty with the Cherokees on the 29th of December, one thousand eight hundred and thirty-five, deducting the cost of the land to be provided for them west of the Mississippi under the second article of said treaty, four million five hundred thousand dollars."

This appropriation act placed this fund in the Treasury of the United States in trust for the Cherokees. It could not be drawn out except in pursuance of an appropriation act to originate in the House of Representatives. The United States is still trustee for the bal-

ance of this fund due per capita to the Eastern Cherokees.

It was drawn out in violation of the law and never has been refunded.

It was not only drawn from the Treasury in violation of law, but was expended in the payment of an obligation of the United States and was an improper charge against the Cherokees.

It was not only withdrawn from the Treasury without authority of law and for an improper purpose, but was expended in disregard of the Act of Congress of June 12, 1838, which provided that the fund appropriated for removal should not be taken from the five million fund.

Congress appropriated July 2, 1836, $600,000, primarily to pay the expense of removal, and added thereto June 12, 1838, the further sum of $1,047,067 for the same primary purpose. The Attorney General of the United States December 16, 1837 (3 Opinions, 297), and February 3, 1838 (3 Op., 304), held that:

"The expense of removal is undoubtedly the first charge on the $600,000."

This opinion, of course, applies with equal force to the enlargement of the $600,000 for the same identical purpose. These two opinions of the Attorney General of the United States were likewise disregarded by the War Department in invading the $5,000,000 fund.

Appropriation for Removal Untouched, But $5,000,000 Fund Invaded in 1838.

The War Department being abundantly supplied with money which they had previously taken out of the five million fund, had no need to utilize the fund appropriated by Congress June 12, 1838, for removal pur-

poses, and that fund was allowed to remain in the Treasury of the United States untouched up to January 1, 1839, when the removal was practically completed, as appears from the report of the Register of the Treasury, on Receipts and Expenditures of 1839, page 260. (Rec. 90, para. 2.) The Court of Claims finds this latter incident as a fact and further finds that out of $1,047,067 appropriated June 12, 1838, only $49,095.31 was actually used by the War Department from the sum so appropriated for removal, while in fact the sum of $1,111,284.70 was taken from the five million dollar fund and used for the expense of removal [precisely as Congress instructed should not be done.] Rec., p. 90.)

It is obvious that these Indians on their heart-breaking journey to the wilderness of the hostile West had neither the means nor the ability of knowing what was transpiring within the accounting department of the government.

The Cherokees having made no preparation to remove were thrown into tremendous excitement by the capture through the military forces of the United States. Large numbers of men were away from their homes interviewing their neighbors and discussing the vital question of what they should do. They were arrested wherever found and thrown into various camps of concentration. Their estates large and small were immediately captured and sold to any sordid adventurer, realizing practically nothing for the owners. In the "sudden and forced gathering of the people into separate masses by the troops children were abruptly severed from doting parents who never met them more." "The young husband was doomed to know that his wife whom he was not permitted to protect, nor

even to behold, had to pause before the rough soldier on the road to a military camp, and under these maddening circumstances, hear the first cry of her infant." "Vast multitudes of both sexes, of all ages, until then habituated to domestic comfort were sickened by the wretchedness and unwholesomeness of being congregated into open fields and crowded under tents during the most scorching heat of summer," and thousands of those nearest and dearest to the surviving Cherokees sunk into miserable graves. The rolls of John Ross showed the death of 600 people in this journey from the East to the West and thousands died of exposure after reaching the Western country.

When the Eastern Cherokees reached the Western Cherokee country John Ross made a resolute effort to establish a united government of the Eastern and Western Cherokees. He called a convention in 1839 and went through a form of declaring an act of Union between the Eastern and Western Cherokees and the adoption of a constitution, but the leaders of the Western Cherokees, knowing that they were in a hopeless minority, refused to co-operate, although a few individuals who were Western Cherokees recognized the wisdom and the imperative necessity of the plan proposed by John Ross and co-operated with him. The effort, however, at a peaceful settlement, substantially failed. There was much bloodshed throughout the Cherokee country. The leaders of the treaty party being killed and outlawed and numerous bitter feuds being actively carried on because of the differences between the Eastern Cherokees, the so-called treaty party, and the Western Cherokees.

Cherokee Commissioners of 1845.

The United States in 1845 sent a Board of Commissioners to the Cherokee country to inquire into their complaints and difficulties, to wit: Hon. Roger Jones, Adjutant General U. S. Army; Hon. Richard B. Mason, Lieut.-Col. 1st Dragoons; Hon. Pierce M. Butler, U. S. Agent. They made their report January 17, 1845. (Sen. Doc. 140, 28th Cong., 2d Ses.) They reported in effect that the five million dollars should not have been charged with expenses of removal and that the United States was bound to restore it and pay it to the Cherokees per capita. They recommended that a new treaty be concluded on the just and liberal basis promised by President Tyler in his letter of September 20, 1841.

President Tyler's letter referred to is as follows:

"I still propose at a future day to negotiate with you a new treaty, which the importance of your speedy return to your homes, to meet the General Council of your nation, will not allow at this time to be done, but you may assure your people that, so far as I shall have any power or influence to effect such results, not justice merely shall be done them, but that a liberal and a generous course of policy shall be adopted towards them. Upon the ratification of the treaty contemplated, which shall give to the Cherokee Nation full indemnity for all wrongs which they may have suffered," etc. (H. R. Rep. 288, 27 Cong., 3d Ses., p. 49.)

The Treaty of 1846 was arranged to restore peace and harmony among the Eastern and Western Cherokees, to provide for the settlement of the claims of the Eastern and Western Cherokees against the United States, and "to make the Eastern and Western Cherokees parties to the Treaty of New Echota, which they had never conceded themselves to be." (Rec. 93, para. 3.)

The Per Capita of 1835-36 a Vested Right.

In interpreting the Treaty of 1846 it should be clearly kept in mind that the payment to the Eastern Cherokees for their communal interest in the lands east of the Mississippi River in the per capita promised them, was a vested personal right. Several thousand of the Eastern Cherokees never did remove from the East and still remain there and obviously the right vested in them could not be taken from them by any subsequent treaty to which they were not parties. The right vested in them can be affected neither by the Treaty of 1846 nor the Cherokee agreement of December 19, 1891.

No such construction could possibly be placed upon the Treaty of 1846 especially. The treaty itself in Article 10 affirms this vested right of the Eastern Cherokees who remained east of the Mississippi River in the following language:

"Article 10: It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in the States east of the Mississippi River had or may have under the Treaty of 1835 and the supplement thereto." (Rec., 96.)

To say that the sums appropriated by Congress for removal should not be charged with removal, but used for other purposes, while the trust fund should be charged with removal, would certainly be a construction of the Treaty of 1846 that would take away the rights and claims of the Indians to the per capita vested in them by the Treaty of 1835. Such a construction is by this article forbidden.

The Treaty of 1846.

Article 1 of the Treaty of 1846 pledged the lands occupied by the Cherokees West of the Mississippi "to the whole Cherokee people for their common use and benefit" and promised them a patent therefor which never has been issued.

Article 2 declared all difficulties and differences theretofore existing between the several parties of the Cherokee Nation thereby settled and adjusted and forever buried in oblivion. That "all party distinctions shall cease, except so far as they may be necessary to carry out this convention or treaty." (Rec., 93.)

It was necessary that the party distinctions of the Eastern and Western Cherokees should not cease until the government had paid them the per capita due by the terms of this treaty. They were communal owners of the lands east of the Mississippi. The Western Cherokees had, however, claimed, after the Ross emigration, that they were exclusive owners of the lands West of the Mississippi under the treaties of 1828 and 1833; that the Eastern Cherokees had acquired no rights therein by the pretended treaty of 1835-6.

The United States insisted that the land granted by the Treaty of 1828 was intended for the whole Cherokee people and not exclusively for the Western Cherokees, that by Article 8 of the Treaty of 1828 that principle was set forth and was well understood. That by that Article the Eastern Cherokees were expressly invited to come to the Western country and make their homes. The Western Cherokees by the Treaty of 1828 gave up to the United States only 2,000,000 acres, while the government granted them for the use of the Cher-

okees East and West 13,500,000 acres in pursuance of the policy determined on by the government to induce the removal of the Eastern Cherokees to the West as rapidly as possible. (Rec. 110.)

The United States was in the difficult position of being obliged to maintain the Treaty of 1835-6, or by conceding that it had no force openly confess to the Cherokees and to the whole world that it was a fraudulent instrument. It was important to the United States therefore to secure the acquiescence of the Eastern and Western Cherokees to this instrument.

The Treaty of 1835 had promised to the Eastern Cherokees the sum of $5,000,000 for their lands and possessions agreeing that after paying individuals for their improvements and ferries and investing $500,000 in land west and the same amount as a general fund, school fund, and orphan fund, for the Nation, the balance should be paid the Eastern Cherokees per capita.

This treaty made no provision for the interest of the Western Cherokees in the lands east of the Mississippi River, but subsequently by the principles agreed on in the 4th Article of the Treaty of 1846, the communal interest of the Western Cherokees was properly provided for.

Western Cherokees Fully Paid for Their Communal Interest in the Lands East as Provided by Article 4, 1846.

The Western Cherokees agreed to leave their claims to a Board of Commissioners. The Commissioners found, as set out in Article 4, Treaty of 1846, that the Western Cherokees had "no exclusive title to the territory ceded in that treaty (1828) but that the same was intended for the use of, and to be the home for the whole

Nation, including as well that portion then East as that portion then West of the Mississippi. The Commissioners further decided that the Western Cherokees were entitled to compensation for their interest in the lands east of the Mississippi "which interest should have been provided for in the Treaty of 1835 but which was not, except in so far as they, as a constituent portion of the Nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi; and in the general funds of the Nation." That therefore, the Western Cherokees had "an equitable claim upon the United States for the value of that interest, whatever it may be."

Article 4, therefore, proceeds as follows:

"Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, to-wit, viz: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five millions six hundred thousand dollars (which investments and expenditures are particularly enumerated in the fifteenth article of the Treaty of 1835), to be first deducted from the said aggregate sum, thus ascertaining the residuum or amount which would, under such marshalling of accounts be left for *per capita* distribution among the Cherokees emigrating under the Treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the old settlers (or Western Cherokees) *a sum equal to* one-third part of said residuum, to be distributed *per capita* to each individual of said party of 'old settlers,' or 'Western Cherokees.' It is further agreed that, so far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five million six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the eighth article of the Treaty

of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted." (9 Stat. L. 871.) (Rec. 94.)

It was supposed that the Western Cherokees at this time were one-third as many people as the Eastern Cherokees, and therefore the principle was agreed on that they should have, not one-third of the residuum but a sum *equal to* one-third of the residuum to be found in the manner proposed.

There is a great difference between a sum equal to one-third of a fund and one-third of the fund itself. The difference is as vital to the owner of the fund as the loss of one-third of his right, while it makes no difference to the recipient what may be the source from which he obtains his one-third. A piece of apple equal to one-third of my apple is a very different proposition from one-third of my apple.

The principle upon which the Western Cherokees were to be paid was set out in an agreed mathematical proposition intended to compensate them for their equitable claim upon the United States for the value of their interest in the lands East without depriving the Eastern Cherokees of anything whatever. The plan of settlement with the Eastern Cherokees was agreed on in a different Article, to-wit, Article 9 of the same Treaty.

The payment of the Western Cherokees has been concluded. A partial payment was made them in 1851 and the remainder was paid them in 1894. The Supreme Court of the United States settled the entire controversy and closed the account with the Western Cherokees in the following statement:

"The treaty fund.....		$5,600,000.00
Less:		
For 800,000 acres of land...	$500,000.00	
For general fund	500,000.00	
For improvements 1,540,572.27		
For ferries	159,572.12	
For spoliations	264,894.09	
For debts., etc.	60,000.00	
For removal of 16,957 Cherokees, $20 each	339,140.00	3,364,178.48
Giving as the residuum to be divided...		$2,235,821.52
One-third due the Western Cherokees.....		$745,273.84
Less payment September 22, 1851.....		532,896.90
Leaving a balance of.....		$212,376.94

(Rec. 102.)

In this settlement the expense for removal did not exhaust the $600,000 appropriated for that purpose and no part of such expense of removal was deducted from the $5,000,000 fund.

This amount with interest was appropriated to the Western Cherokees August 23, 1894. The Western Cherokees by the rolls of 1852 which control in the final distribution numbered 3,146 persons who received the sum of $236.89 per capita excluding interest. (Rec., 102.)

The Eastern Cherokees, however, numbered 16,231 and received in 1852 only $914,026.13, a per capita of $56.31 and if they now received the fund they claim $1,111,284.70, would only receive a total per capita of $124.78 excluding interest.

It is obvious the Western Cherokees have received more for their communal interest in the lands East than the Eastern Cherokees can now receive. This is explained partly by the fact that the Western Cher-

okees were supposed to be equal to one-third of the number of the Eastern Cherokees, when in point of fact, they were less than one-fifth.

The Supreme Court found the residuum, whereof a sum equal to one-third, was to be divided per capita to the Western Cherokees as $2,235,821.52 (Rec., 102); while the account rendered by the United States May 21, 1894, found the balance to be distributed per capita to the Eastern Cherokees under Article 9 to be $2,025,310.83, over $200,000 less than the residuum found by the Supreme Court under the statement of the 4th Article. (Rec., 109.) Of this sum $914,026.13 was paid them in 1852 and the pending suit is to recover the remainder of such balance, due the Eastern Cherokees per capita, to wit, $1,111,284.70, which, when paid, will give the Eastern Cherokees as stated $124.78 per capita excluding interest. The Western Cherokees have already for their communal interest received $236.89 per capita.

The Eastern and Western Cherokees under the principles of the treaty of 1846 were communal owners of the lands East. But the manner in which the Western Cherokees as such were to be paid was precisely and definitely fixed in Article 4 of that treaty and they have received every dollar due them under the 4th article of that treaty and in pursuance of a decision of this honorable court. (148 U. S. 427.)

The Eastern Cherokees for their communal interest in the lands East were to be paid in the manner stipulated by the 9th Article. They received a partial payment of $914,026.13 in 1852 and the balance $1,111,284.70 is now due them with interest.

The 9th Article of the Treaty of 1846 Provides Payment for Communal Interest of Eastern Cherokees in Lands East.

The manner in which the Eastern Cherokees were to be paid as communal owners of the lands east of the Mississippi River is set forth in Article 9, of that treaty, as follows, to-wit:

"Art. 9. The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the *per capita* division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said Nation; and the several sums provided in the several articles of the treaty, to be invested as the general funds of the Nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the Treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, *per capita*, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the Treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplements thereto."

Article 9 must be construed as modified by Articles 3, 10, and 11, of the same treaty. Article 3 is as follows:

"Art. 3. Whereas certain claims have been allowed by the several Boards of Commissioners heretofore appointed under the Treaty of 1835 for rents, under the

name of improvements and spoliations, and for property of which the Indians were dispossessed, provided for under the 16th Article of the Treaty of 1835; and whereas the said claims have been paid out of the five million dollar fund; and whereas said claims were not justly chargeable to that fund, but were to be paid by the United States, the said United States agree to reimburse the said fund the amount thus charged to said fund, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th Article of this treaty; and whereas a further amount has been allowed for reservations under the provisions of the 13th Article of the Treaty of 1835 by said Commissioners, and has been paid out of the said fund, and which said sums were properly chargeable to, and should have been paid by the United States, the United States further agree to reimburse the amounts thus paid for reservations to said fund; and whereas the expenses of making the Treaty of New Echota were also paid out of said fund, when they should have been borne by the United States, the United States agree to reimburse the same and also to reimburse all other sums paid to any agent of the Government and improperly charged to said fund; and the same shall also form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th Article of this treaty." (9 Stat., L. 871.)

Here was an express provision providing for the correction of various errors which had been confessedly made against the five million fund and providing for the reimbursement of such sums as had been improperly charged against that fund under the caption of:

1st. Improvements.

2nd. Spoliations.

3rd. Property of which the Indians were dispossessed, claims which were not justly chargeable to that fund.

4th. Reservations not properly chargeable to that fund.

5th. The expenses of making the treaty of New Echota.

6th. All other sums paid to any "agent of the Government" and improperly charged to said fund. It was agreed that the same should be reimbursed to the five million fund, and be a part of the aggregate amount to be distributed to the Eastern Cherokees as provided in the 9th Article of this treaty.

The money now sued for was paid to Captain John Page, an "agent of the Government" in 1838, and expended by him on account of removal expenses, and was "improperly charged to said fund" and under the 3rd Article of this treaty should be reimbursed.

Article 11 provides that the question of whether any part of subsistence was charged to the five million fund and whether interest was allowed, should be submitted to the United States Senate as follows:

"Art. 11. Whereas the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the West, of the Eastern Cherokees, is not properly chargeable to the treaty fund: it is hereby agreed that that question shall be submitted to the Senate for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee funds, and if by the Cherokees, then to say, whether the subsistence shall be charged at a greater rate than $33.33 per head; and also the question, whether the Cherokee Nation shall be allowed interest on what ever sum may be found to be due the Nation, and from what date and at what rate per annum." (Ibid.)

It is to be observed that the question of removal was omitted by the Cherokee delegations in this request for the obvious reason that the Senate had already decided the question of removal in the Treaty of 1836 sustaining

the Cherokees who made the treaty in the proposition that it was not intended that the cost of removal should be charged to the five million fund, and this construction had been confirmed and ratified by Congress July 2, 1836 and June 12, 1838.

It is to be observed that the word "delegations" in the above article is plural showing unanimity in this contention by both the Eastern and Western Cherokees.

The Senate of the United States, Sept. 5, 1850, acting as umpire decided that subsistence was not properly chargeable to the treaty fund and that interest should be allowed upon sums found due the Cherokees at five per cent from June 12, 1838. (Rec. 96 last para.)

Congress on the 30th of September, 1850, ratified and confirmed this award of the Senate declaring on the face of the Statute that certain sums which had been charged to the treaty fund for subsistence had been "improperly charged." (Rec. 97.)

The Eastern Cherokees who remained East of the Mississippi River undertook to preserve their rights against the possibility of any misconstruction of the Treaty of 1846 by the accountants of the United States in Article 10, as follows:

"Art. 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so constructed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi River had, or may have, under the Treaty of 1835 and the supplement thereto." (Ibid.)

Article 10 puts a limitation upon the construction of the Treaty of 1846 so that the accountants of the United States are expressly forbidden to construe the Treaty of 1846 so as "in any manner to take away or abridge" the rights of those Cherokees residing east under the Treaty

of 1835 and the supplement thereto. This inhibition protects all Eastern Cherokees as it establishes a rule of construction.

This article appears to be excess of caution by the Eastern Cherokees but it was not, in view of their experience, and in view of the fact that in this very suit Government counsel has attempted to construe the Treaty of 1846 to deprive the Eastern Cherokees both East and West, of the fund due them. And this contention has been made in the face of the directly contrary opinion of Hon. John J. Crittenden, Attorney General of the United States of April 16, 1851, who passed upon the meaning of the treaty of 1846 at a time when the entire history thereof was fresh in the minds of the officers of the United States. Attorney General Crittenden said:

"The Treaty of 1846 does not expressly nor by implication abrogate any of the interests of the Cherokees in the distribution per capita provided for in the Articles 12 and 15 of the Treaty of 1835. The Treaty of 1846 intends to provide for satisfaction of those claims, not to forfeit, repeal, or annul any of them." (5 Ops. 320.)

The Cherokees so understood the Treaty of 1846. They had not the faintest idea that the treaty could be construed to deny the payment of the very claims for the payment of which the treaty was drawn. If the Attorney General of the United States at the time declares that the Treaty of 1846 intends to provide for the satisfaction of those claims not to forfeit, repeal or annul any of them, who shall believe that the Cherokees otherwise understood the treaty. And as the Indians understood it so is the rule of construction under the decisions of this Honorable Court.

The question in this case is: did the Eastern Chero-

kees understand that by this treaty and the settlement proposed in Article 9 that the five million fund was chargeable with the cost of removal expenses?

If they did not understand by this treaty that removal expenses were to be charged to them they are entitled to recover the amount claimed independently of the Cherokee Agreement of Dec. 19, 1891 and the accounting rendered in pursuance thereof.

Certainly no where in the Treaty of 1846 do the Eastern Cherokees agree that the cost of removal should be charged to the five million fund. Article 9 pledges them a *fair and just* settlement of all moneys due to the Cherokees and subject to the per capita division under the Treaty of 1835. Which said settlement shall exhibit all money properly expended under said treaty. It would not be "fair and just" in making settlement under the Treaty of 1835 to charge the Cherokees with the cost of removal. The settlement proposed by necessary implication excludes all money not "properly" expended under said Treaty of 1835. It would not be necessary in ordinary contracts to stipulate that in a settlement the United States should only take credit for moneys properly expended. Without any stipulation, in a "*fair and just*" *settlement* the United States could not claim credit for sums improperly expended out of a trust fund. Article 9 not only restricts the settlement to exhibit all money properly expended *theretofore* but *thereafter*.

The Understanding of the Cherokees in 1846, When They Agreed to Article 9.

The Supreme Court in the case of the Cherokee Nation *v.* Journeycake, laid down a principle of interpretation we now invoke:

"In order to determine the meaning of this contract we must place ourselves in the circumstances of the parties at the time, with their surroundings and expectations. (155 U. S., 216.)

In order to appreciate the understanding of the Eastern Cherokees in agreeing to a fair and just settlement under the Treaty of 1835, it should be kept in mind that they had before them the history of this entire transaction.

They well remembered Article 8 of the Treaty of 1828 in which the United States had expressly agreed to pay the entire cost of removal and subsistence, and which was in full force in 1846.

They well remembered that with this treaty obligation in full force as a subsisting contract of the United States, that the Senate of the United States had on March 5, 1835, by an award, advised that the Cherokees should receive five millions of dollars for their "lands and possessions" and for their lands and possessions alone, not including other things.

They remembered the letter of President Jackson read to them October 23, 1835, in which they were told that the United States would pay the expense of removal and subsistence and pay them a per capita of $150 each.

They remembered the Cuthbert letter of Feb. 29, 1835.

They remembered that the Treaty of December 29, 1835, with its supplementary articles, had construed this very question. That the Senate in supplementary Article 2 had decided that it did not intend the five millions to include removal or spoliations.

They remembered that the Congress of the United States on the 2d of July, 1836, had sanctioned and ratified the decision of the Senate and had appropriated a sum estimated as more than sufficient to pay the entire cost of removal and spoliations.

They remembered too how bitterly they were opposed to leaving their old homes, and they knew that in a "fair and just" settlement they ought not to be charged with the expense of doing that which was of value to the United States but which was heart breaking to them.

They remembered too that the Department of War had advised the Cherokee Indian Agent B. F. Curry, on November 18, 1836, that the 8th Article of the Treaty of 1828, was in full force, and that Curry had so advised them.

They remembered that Lieut. J. Van Horne, the enrolling of the War Department under instructions of September 12, 1837, had been over their country trying to enroll the Cherokees for removal West, and promising them by the terms of the enrollment that the United States would pay the cost of removal and subsistence, and the terms which had been offered by the President, which included $150 per capita.

They remembered that the Secretary of War had on the 18th of May, 1838, agreed with John Ross and his delegation that the United States should defray the expense of the removal of the Cherokees.

They remembered that this proposal of the Secretary of War had been by the President submitted to the Congress of the United States and that Congress on June 12, 1838, had sanctioned and confirmed the action of the Secretary of War, and appropriated a sum estimated as more than sufficient to pay the entire cost of removal.

And they well remembered too the pledge of the President of the United States, John Tyler, in his letter to them of September 20, 1841, in which he agreed that:

"Not justice merely shall be done them, but that a liberal and generous course of policy shall be adopted towards them upon the ratification of the treaty con-

templated, which shall give to the Cherokee Nation full indemnity for all wrongs which they may have suffered."

They remembered too that the President of the United States had appointed three distinguished men to examine into their affairs: Hon. Roger Jones, Adjutant General of the United States Army; Hon. Richard B. Mason, Lieutenant Colonel of the First Dragoons; and Governor Pierce M. Butler, United States Agent. They remembered that these Commissioners in their report to the President (Senate Doc., 140, 28 Cong., 2d Ses. Vol. 8, p. 12) had taken strong grounds in their behalf and recommended that the per capita promised them by the Treaty of 1835 should be immediately made and that a new treaty on the liberal basis proposed by President Tyler should be made.

How could these Indians have understood with this record before them, when they were promised by Article 9 of the Treaty of 1846 a "fair and just" settlement, which should exhibit all sums properly expended, that they were in fact agreeing to charge themselves with the cost of removal and subsistence and were by their own act agreeing to deprive themselves of the per capita promised them as the purchase price of their lands east.

Even if they should recover the amount now in suit they would receive less than 50 cents an acre for the lands they sold to the United States in 1836.

Even if they should now recover they would only receive a per capita of $124.78 instead of $150 as promised them by President Jackson, and they will have waited for settlement seventy years.

There can be no possible doubt that these Eastern Cherokees understood and truly believed that the Treaty

of 1846 was made for the purpose of paying them the amount promised them by the United States in the Treaty of 1835-36, and not drawn for the purpose of annuling such claims in whole or in part.

The Attorney General of the United States himself immediately after this treaty was made, on December 27, 1851, as we have heretofore shown, held that the Treaty of 1846 was not intended to "forfeit, repeal, or annul any of them," but that "the Treaty of 1846 intends to provide for the satisfaction of these claims." (5 Opinions, 520.)

If the Attorney General of the United States so understood it, Government counsel should not now be heard to charge these Indians with a contrary understanding of the Treaty of 1846.

By Article 11 of the Treaty of 1846 it was agreed to submit to the Senate of the United States the question whether the five million fund was chargeable with the cost of subsistence. The Cherokees insisted that it was not chargeable with "subsistence" for the reasons which have been substantially set forth above relative to removal, removal and subsistence being substantially one transaction and occurring throughout the treaties always together and qualified by the same language in the various articles, as in Article 8 of the Treaty of 1828, Article 15 of the Treaty of 1835, Article 9 of the Treaty of 1846 and Article 4 of the Treaty of 1846. On September 5, 1850, the Senate as umpire adopted the following resolution:

"Resolved by the Senate of the United States that the Cherokee Nation of Indians are entitled to the sum of $189,422.76, for subsistence, being the difference between the amount allowed by the Act of June 12, 1838 and the amount actually paid and expended by the United States, and which excess was improperly

charged to the treaty fund in the report of the accounting officers of the Treasury."

Here the Senate of the United States, acting as umpire and in pursuance of a treaty, declared expressly that certain money paid for subsistence was "improperly charged" to the Treaty fund. If this is true and if the word "subsistence" is qualified in the treaties precisely as the word "removal" in the same identical articles, it is obvious that removal by like interpretation is also not chargeable to the five million fund.

On September 30, 1850 (9 Stats. 556), the Congress of the United States ratified and confirmed the above decision of the Senate as follows:

"For the additional amount for expenses paid for subsistence and improperly charged to the treaty fund, according to the award of the Senate of 5th day of September, 1850, under provision of the 11th Article of the Treaty of 6th day of August, 1846, $189,422.76, and that interest be paid on the same at the rate of five per cent per annum according to a resolution of the Senate of 5th September, 1850; provided that said money shall be paid by the United States and received by the Indians on condition that the same shall be in full discharge of the amount thus improperly charged to the treaty fund.

Here Congress in this Act twice declares that money charged against the treaty fund for subsistence was "improperly charged."

This is a legislative interpretation that subsistence is not properly chargeable to the five million fund. If it was not proper to charge the treaty fund with the cost of removal it was not proper to charge that fund with the cost of "subsistence," and vice versa, because, both in the 15th Article of the Treaty of 1835 and the 9th Article of the Treaty of 1846, these terms are qualified precisely in the same way.

This interpretation as to subsistence rested on the same basis which led Congress in 1836 and in 1838 to decide that "removal" was not chargeable to the $5,000,000 fund.

The reason why it was improper to charge the five million fund with removal or subsistence was because the five million fund belonged to the Cherokees as the purchase price of their land. That purchase price was not chargeable with the cost of removal or subsistence because removal and subsistence were treaty obligations of the United States. The same reason applies with equal force to the removal and subsistence expenses and rendered it equally improper to charge the five million fund with the expense of either.

The Eastern Cherokee fund of $5,000,000 having been improperly charged on account of removal expense in the sum of $1,111,284.70, that sum should now be reimbursed and paid to the Eastern Cherokees as provided by Article 9 of the Treaty of 1846, with interest as provided by Article 11 of that treaty.

When the United States made up the accounts in 1851 the Cherokees immediately protested against such settlement by resolution of the national council of November 27, 1851, upon nine counts. (Rec. pp. 98-99.)

The first count of the Cherokee protest was as follows:

"Because no allowance is made for the sums taken from the treaty fund for the removal to the West, although that charge depended precisely on the same word in the Treaty of 1835 as did the one year's subsistence, the Senate unanimously decided on the question submitted to them as arbitrators that the item of subsistence was not a proper charge upon the Cherokee fund. That had been the decision of the Senate about the date of the treaty when that question was specially

presented. It was again so considered by Mr. Poinsett, Secretary of War, in 1838, and his decision was sanctioned by the action of Congress and an appropriation was made for that purpose. (Rec. 98.)

This language shows how the Cherokees understood the matter at that time.

The nine objections made in this protest to the settlement of 1851 were carefully reviewed by the United States in the accounting rendered in pursuance of the Cherokee agreement of December 19, 1891. Most of the points were decided against the Cherokees, but in the matter of removal expenses the United States found in favor of the Cherokees and that the sum of $1,111,284.70 with interest was due under the 9th Article of the Treaty of 1846, or the 15th Article of the Treaty of 1835, each of which was to the same effect.

Counsel for the Government has heretofore claimed that the decision of the court in the Western Cherokees case (148 U. S. 427) has found that removal expenses were justly chargeable to the five million fund.

The fact is, in the settlement with the Western Cherokees the Supreme Court of the United States in casting up the accounts found that the cost of removal expenses $339,140, was chargeable against the aggregate sum of $5,600,000. It was a primary charge on the $600,000 fund appropriated for that purpose. It did not exhaust the fund appropriated for removal, and did not therefore come out of the five million fund at all.

The Eastern Cherokees were not parties in the case of the Western Cherokees against the United States and would not have been bound even if such interpretation had been made, as to the Western Cherokee settlement under Article 4, in which the Eastern Cherokees were not involved.

The Question of Interest.

The United States in rendering the complete account of moneys due under the treaties, found that, under the 9th Article of the Treaty of 1846, there was due the Cherokees the sum of $1,111,284.70, which had been improperly charged to the $5,000,000 fund on account of removal expenses, and interest thereon from June 12, 1838, to date of payment.

Under the 11th Article of the Treaty of 1846, the Cherokees had agreed to submit to the Senate of the United States, as umpire, the question whether interest should not be allowed them on the sums found due them. The Senate of the United States, as umpire, on September 5, 1850, found that interest should be allowed in the following resolution:

"Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid." (Rec. 96.)

When the Western Cherokees appealed to the Supreme Court of the United States upon this question, demanding interest upon the balance of the per capita due them under this same treaty, and that they should be allowed interest upon the sum which *should have been found due to them in* 1851, the Supreme Court through Mr. Chief Justice Fuller said: (italics ours.)

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed at the rate of five per centum per annum upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum *then found due was less than*

should have been found due by the amount of $212,376.94.

"Under Section 1091 of the Revised Statutes, no interest can 'be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest;' and in Tillson *v.* United States, 100 U. S., 43, it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed; was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. (9 Stat. 556 C. 91.)

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item $4,179.26, which stands upon different ground." (148 U. S., 478).

No argument of counsel can add anything whatever to the force of this declaration by the Supreme Court of the United States.

The Congress of the United States on numerous occasions recognized the force of the decision of the Senate and made appropriations accordingly, appropriating the funds due as interest.

On September 30, 1850, Congress appropriated to the Eastern Cherokees in reimbursing an amount improperly charged the treaty fund for subsistence the sum of $189,422.76, with the provision:

"That interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate of the fifth of September, eighteen hundred and fifty." (9 Stat. 556.)

On February 27, 1851, Congress, in appropriating the amount of the per capita then conceded to be due the Eastern Cherokees, to-wit, $724,603.37, provided as follows:

"And interest on the above sum at the rate of five per centum per annum, from the twelfth day of June, eighteen hundred and thirty-eight until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated." (9 Stats. 572.)

Congress, on September 30, 1850, in appropriating the amount of the per capita, then conceded to be due the Western Cherokees, provided:

"That interest be allowed and paid upon the above sums due respectively to the Cherokees and Old Settlers, in pursuance of the above mentioned award of the Senate, under the reference contained in the 11th Article of the Treaty of sixth August, eighteen hundred and forty-six." (9 Stat. L. 556.)

On August 23, 1894, Congress appropriated for the benefit of the Western Cherokees the amount found due them by the Supreme Court including interest up to the date of the judgment of the Court of Claims under the same principle above set forth. (28 Stat. 451.)

On March 3, 1899, the Congress of the United States made the following appropriation to the Western Cherokees:

"That the sum of $29,857.74, being the interest at five per centum per annum from June 6, 1893, to March 28, 1896, due the Western Cherokee Indians under the award of the United States Senate of September 5, 1850, on the principal sum of $212,376.94, found to be due

them under the decision of the Supreme Court of June 6, 1893, is hereby appropriated, to be paid to the authorized agent of the council of the Western Cherokee Indians." (30 Stat. 1235.)

The sum found due the Eastern Cherokees in 1852 *was less than should have been found due them by the amount of* $1,111,284.70, and under the principle laid down by the Supreme Court in the first paragraph of the above quotation from the decision in case of the Western Cherokees, the Eastern Cherokees are entitled to the interest as claimed.

The question of interest was a "subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself" in 1846 and in the "agreement itself" in 1891, and is precisely the same in principle as that of the Western Cherokee case.

To Whom Should the Judgment Be Rendered—To the Cherokee Nation as a Government, to the Cherokee Tribe as a Tribe, or to the Eastern Cherokees as a Band?

The jurisdictional act (Rec., 78, last of para. 3.), of March 3, 1903 (32 Stats. 996), authorizes the court "to render a judgment in favor of the **rightful claimant,** and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part." (Rec. 78.)

The jurisdiction act of March 3, 1903 (Rec. 78), was passed at the request of the Eastern Cherokees who desired expressly to determine the issue between themselves and the Cherokee Nation.

The House of Representatives at the suggestion of the Eastern Cherokees had passed a resolution on December

16, 1902, inviting a report from the Attorney General on the claim of the Eastern Cherokees. The Eastern Cherokees argued the case before the Attorney General but on January 16, 1903, the Cherokee Nation, as a body politic, by its attorneys denied the claim of the Eastern Cherokees. The Attorney General on January 22, 1903, made the following report to Congress:

"The Cherokee Nation, as I am informed, asserts a right to this claim; has employed counsel to prosecute the same agreeably to said statute, and is about to institute a suit upon the claim in the Court of Claims against the United States.

"The terms of the statute are, fortunately, such that the Eastern Cherokees, who, as I am informed, claim adversely to the Cherokee Nation, may be made parties to the suit and compelled to litigate with the Cherokee Nation their adverse assertions of ownership, so that the rightful claimant against the United States may be judicially ascertained after full opportunity upon the part of both claimants to be heard, and the United States be thereby fully protected in the payment of the claim of the successful claimant, if the claim be adjudged to be a valid one against the Government." (H. R. Doc. 309, 57th Con., 2d Ses., p. 3.)

Thereupon, the Congress on March 3, 1903, authorized the court "to render a judgment in favor of the rightful claimant," and provided in the jurisdictional act that "both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned."

If the Eastern Cherokees are the rightful claimants they are entitled under the jurisdictional act to the judgment. If the Cherokee Nation as a body politic is the rightful claimant, or if the Cherokee tribe as a tribe is the rightful claimant, it is entitled, as such, to

the judgment. It is obvious that there can be but one rightful claimant. Either the Eastern Cherokees must have judgment or the Cherokee Nation as a body politic must have it.

These are the only claimants in fact before the court.

The Cherokee Nation has brought its suit as a body politic and not as the Cherokee tribe. There is a vast difference between the Cherokee Nation as a body politic and the Cherokee tribe as an aggregation of people. The attorneys of the Cherokee Nation take great pains to declare the Cherokee Nation, claimant in this case, a body politic, and in their petition (Rec. 1, last paragraph) say:

"Second. The Cherokee Nation, claimant herein, is, and since the act of union between the Eastern and Western Cherokees, on July 12, 1838, has been, a body politic, and recognized and dealt with as such by the United States in all matters affecting the rights, interests and property of the Cherokee Nation or tribe, or the members thereof; and is, as such, the 'Cherokee tribe' mentioned in Section 68 of the Act of Congress aforesaid, and authorized thereby to bring this proceeding."

It thus appears that the Cherokee Nation brings its suit as a body politic and asserts that the term "Cherokee tribe" referred to in the jurisdictional act is a body politic.

The language of Section 68 is that jurisdiction is conferred upon the court to adjudicate "any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States."

Obviously the Cherokee tribe or any band thereof, means the Cherokee people as a people or any band thereof, and does not mean the Cherokee Nation as a

body politic or any band thereof, because a body politic is not capable of being sub-divided into bands. A body politic is a governmental organism comprised of executive, legislative and judicial departments not capable of sub-division into bands.

The Cherokee Nation, as a body politic, was not authorized to bring this suit.

The Cherokee Nation, as a body politic, not being authorized by the jurisdictional act to bring suit cannot possibly recover judgment in this consolidated case.

It is not the "rightful claimant." It is not even authorized to sue as "claimant."

The Cherokee Nation, as a body politic, is not really a possible claimant of the fund in question, because the Cherokee Nation as a body politic has never owned or pretended to own the land of which this fund is the proceeds. The owner of the Cherokee Outlet was the Cherokee tribe and the bands thereof including not only Cherokees by blood, but their adopted citizens, the Delawares, the Shawnees, the Freedmen, whose rights as such have been determined by this Honorable Court.

Since the Cherokee Nation, as a body politic, was not authorized to bring this suit by the jurisdictional act, and since the Cherokee Nation, as a body politic, was not the owner of the Cherokee Outlet or the proceeds thereof, much less of the proceeds of the lands owned by the Eastern Cherokees east of the Mississippi and sold to the United States by the Treaty of 1835, it follows that the Cherokee Nation as a body politic is not the rightful claimant.

Status of Cherokee Nation as a Body Politic.

In making the Cherokee agreement of December 19, 1891, the Cherokee Nation, as a body politic, acted as

the representative of its citizens according as their rights might appear by the provisions of the treaties. In the Delaware case it was held by this Honorable Court (155 U. S., 196), that the Delawares were equally entitled to participate in the cash proceeds of the Outlet as other Cherokees by blood, under the 15th Article of the Treaty of 1866, and the Delaware Cherokee agreement of April 8, 1867. In the Shawnee case (155 U. S., 218), the same decision was rendered, recognizing in the Shawnees their right to an equal per capita payment out of such proceeds of the Outlet in accordance with their rights as established by Article 15 of the Treaty with the Cherokees of July 19, 1866, and the Cherokee Shawnee agreement of June 7, 1869. In the Freedmen case the Court of Claims rendered the same decision in effect, giving them a like right to an equal per capita out of the proceeds of the sale of the Cherokee Outlet in accordance with their rights as established by the 9th Article of the Cherokee Treaty of July 19, 1866 (30 Ct. Cls., 159), and said:

"The United States have repeatedly recognized in their transactions with the Cherokees the dual character of the people, sometimes national and sometimes communal. They have also recognized portions of the people as distinct communities. In 1835 they so dealt with the Georgia Cherokees as communal owners, setting apart a portion of the purchase money of their lands for national purposes, but paying part to them per capita. In 1846 they so dealt with the Western Cherokees, segregating them from the mass of their countrymen and paying them individually, a community within a community. In 1866, and by the very treaty which lies at the foundation of this suit, they recognized the Delawares as communal owners of a fund in the Treasury, for though the Delawares were to be merged in the Cherokee Nation and become Cher-

Memorandum.

In this brief the Cherokee Nation has been referred to as "a body politic" in the sense and to the extent only that it might be regarded as a government. The Eastern Cherokees emphatically deny that the Cherokee Nation is a body politic, and do not concede that it ever has been a body politic or a body corporate recognized as such by the United States, or that it has been recognized in any other capacity than as a "community" acting through its chosen representatives. It has no chartered existence as a body politic. It has only been recognized as a community with limited power of self-government, long since destroyed, and with the power to act through its chosen instrumentalities, the National Council and the Chief, in dealing with the United States. In the Cherokee allotment act of 1902, by which the complete disintegration of the Cherokee Nation as a government was effected, it was done by a vote of the whole people as a community.

okee citizens, and contribute to the Cherokee fund, nevertheless, there was to remain in the Treasury a portion of the Delaware fund which would not pass to the Nation for national purposes, but which would continue to be the separate property of a people who were no longer to be a body politic, a nation, but who, so far as the ownership of the fund was concerned, were still to be communal owners. Still later the United States have recognized the continued existence of these communities by allowing them to bring actions in this court in regard to their communal property."

(Eastern Cherokees *v.* U. S., 20 C. Cls., 449; Western Cherokees *v.* U. S., 27 Id. 1; Shawnes *v.* U. S., Id. 447; Delawares *v.* Cherokee Nation, 28 Id., 281.)

The Cherokee agreement of December 19, 1891, provided that the proceeds of the Cherokee Outlet should be paid to the Cherokee Nation, but nevertheless the courts found that the fund was due to the citizens of the Cherokee Nation, as their rights appeared under the treaties by which they acquired the right to participate in the proceeds of the sale of this property.

The Congress of the United States found that the Cherokee Nation as a body politic was acting unjustly to the constituent communities of the Cherokee Nation and authorized these communities to enforce their rights through the courts. Even before the Cherokee agreement was made Congress had taken this step on October 1, 1890, in authorizing the Delaware, Shawnee, Freedmen suits (26 Stat., 636), because the Cherokee Nation as a body politic theretofore had made an unfair distribution of funds received from the sale of a portion of the outlet and from the grazing privileges upon that tract of land.

At the very time when the Cherokee agreement of December 19, 1891, was ratified (March 3, 1893), Congress

authorized the Commission to the Five Civilized Tribes, known as the Dawes Commission, to open negotiations with the Cherokee Nation and the Five Civilized Tribes for an allotment of the lands of these tribes and a dissolution of their governments. The tribes being unwilling to negotiate, the Congress of the United States on June 7, 1897 (30 Stat., 83), passed the following act, to wit:

"Provided further, That on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first eighteen hundred and ninety-eight, by any person in said Territory, and the United States Commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts."

This act thus, in effect, abolished the courts of the Cherokee Nation and its constabulary and the authority of the legislative and executive departments thereof.

At the same time and in the same Act Congress provided also, as follows:

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their pas-

sage to the President of the United States and shall not take effect, if disapproved by him, or until thirty days after their passage: Provided, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes."

It will be observed that this practically emasculated the legislative functions of the Cherokee Nation, if indeed the previous section had not accomplished that result.

On June 28, 1898 (30 Stats. 502) the Congress of the United States directed the United States Commission to the Five Civilized tribes to make up the rolls of the Cherokee people and to allot the lands of that tribe to its citizens making all needful rules and regulations for the accomplishment of that purpose.

By this act it was provided among other things as follows:

"Sec. 26. That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

It is clear that since the judicial department of the Cherokee Nation had been abolished by the Act of June 7, 1897, and since Section 26 of the Curtis Act provided that the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States, the legislative and executive departments of the Cherokee Nation was abolished to all intents and purposes since there was no means of enforcing its laws. The Cherokee national council and the Chief could not under these statutes punish the crime of murder.

It was further provided in the Act of June 28, 1898 (30 Stat. 502) in Section 19 as follows:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments, or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

In other words, the Cherokee Nation after the passage of this act was not permitted to receive any further moneys, and especially was it forbidden to receive any moneys due and payable to the members of the tribe per capita.

Its Capacity to Act as Trustee Was Thus Abolished.

The Cherokee Nation as a governmental organism was by these acts itself practically dismantled and destroyed. Its courts had no jurisdiction. Its constabulary had no function. If its legislature passed laws they were a nullity not capable of enforcement. Its executive had no laws to execute.

On July 1, 1902 (32 Stat., 725, Section 63) the Congress of the United States passed a final allotment act, arranging the complete disposition of all property of the tribe and authorizing them by their vote to approve the same, which the Cherokee people did on August 7, 1902. It was provided by this act, Section 63, as follows:

"The tribal government of the Cherokee Nation shall not continue longer than March 4, 1906."

In 1903 the last regular election of the Cherokee peo-

ple for the election of a national council, was held, and the national council which is the tribal legislature expired on the 30th of October, 1905, the present nominal chief having refused to call an election for a successor to the council. There is now no legislative branch of the so called Cherokee government as a body politic, and the chief has no function except that of clerk to sign his name to allotment deeds up to March 3, 1906, when this privilege will cease in default of some special arrangement to be made by Congress.

In view of this condition of the Cherokee Nation as a body politic, it is manifest that Congress intentionally authorized the Cherokee tribe or a band thereof to sue and did not authorize the Cherokee Nation as a body politic to sue. The Cherokee tribe would not become extinct. The Cherokee Nation as a body politic was already defunct, and in the very act of July 1, 1902, authorizing this suit in Section 68, the complete cessation of the Cherokee Nation as a body politic was provided in Section 63 immediately in advance of the Section 68 giving jurisdiction to the courts to hear this case.

The Eastern Cherokees therefore insist:

1st. That the Cherokee Nation as a body politic was not authorized to bring suit and therefore is not and cannot be the rightful claimant.

2nd. That the Cherokee Nation as a body politic is not, and cannot be, either the legal or the equitable owner of the fund, or any part thereof since the Cherokee Nation as a body politic has never owned either lands or moneys, under the decisions in the case of the Delawares, Shawnees and Freedmen, but the lands and moneys of the Cherokees belong to the citizens of the community as communal owners. Therefore the Cherokee Nation as a body

politic is not the rightful claimant and is not entitled to judgment.

3rd. That the Cherokee Nation, as a body politic, has had no capacity to act as Trustee for anybody, since June 28, 1898.

The Eastern Cherokees were the owners of the lands east of the Mississippi River sold to the United States by the Treaty of 1835-36, and the fund in controversy is the balance of the proceeds of the sale of such communal lands and is directly due to the Eastern Cherokees per capita by the 9th Article of the Treaty of 1846, as well as by the principles laid down in the Deleware, Shawnee and Freedman cases. The principle in the cases referred to is that the communal owners of the lands sold are entitled to the proceeds of such sale. (155 U. S., 196 and 218; 30 Ct. Clms., 159.)

Under the account rendered in pursuance of the Cherokee agreement there were four items, three of which belonged to the whole Cherokee people West. The first item (Rec., 108), is the value of three tracts of land which by treaty belonged to the general school fund—$2,125.00. The third item was a part of the proceeds of the sale of lands in Kansas owned by the whole Cherokee people and therefore belonging to the whole Cherokee people—$432.28. The fourth item, which had been taken from the Cherokee National fund, belonged to the whole Cherokee people under the Treaty of 1866.

The second item of $1,111,284.70, with interest, belonged to the Eastern Cherokees as the proceeds of their land as above explained.

The Cherokee Nation as a body politic being defunct, the Court of Claims was compelled in its judgment providing for the disposition of these three items

belonging to the whole Cherokee people, to provide that they should be credited on the books of the United States and held by the United States as trustee. It is true that the judgment as to the sum of $432.28, provides that it may be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it. But the judgment might as well have said that it should be paid directly to the United States as trustee, because there is no proper agent of the Nation to receive it, and it cannot be paid to any proper agent of the Cherokee Nation, since that Nation as a body politic is defunct, and when this case is terminated there will be no Cherokee Nation.

How can the Cherokee Nation as a body politic have judgment rendered to it when it has no capacity to act as trustee and when the Court of Claims recognized its incapacity to receive or administer the tribal funds, and in the very face of the judgment declared that the United States shall act as trustee for the tribe.

Since the court was compelled to declare that the United States must act as trustee for the sums due the whole Cherokee people, is it not clear that the Cherokee Nation as a body politic was not recognized by the court as having either the right or capacity to act as such trustee? It therefore follows that the Cherokee Nation as a body politic is not the "rightful claimant" either for itself or as a trustee.

There are but two claimants before the Court in this case, the Cherokee Nation as a body politic and the Eastern Cherokees. One or the other of these claimants is the rightful claimant if the judgment goes against the United States. That the Eastern Cherokees constitute the rightful claimant and the only rightful claimant we humbly submit has been conclusively shown.

The Eastern Cherokees of North Carolina.

Between the Cherokee Nation as a body politic and the Eastern Cherokees of North Carolina there is no privity whatever on any theory of the case. The Eastern Cherokees of North Carolina are not citizens of the Cherokee Nation as a body politic. The Cherokee Nation as a body politic, even if the above considerations did not otherwise render it impossible, could not claim to be trustee for the Eastern Cherokees of North Carolina, since such Cherokees owe no allegiance to the Cherokee Nation and the Cherokee Nation would owe them no protection even if it had capacity as a government, which it has not. If the Cherokee Nation as a body politic is the rightful claimant and a judgment should be rendered to the Cherokee Nation in such capacity as the rightful claimant on the theory that the body politic was a trustee for its own citizens, that theory could not obtain as to the Eastern Cherokees of North Carolina who have not only not recognized the Cherokee Nation as their trustee, but on the contrary have vigorously protested on various occasions to the United States against the Cherokee Nation as a body politic or otherwise acting in any capacity as the representative of the Eastern Cherokees of North Carolina. The Eastern Cherokees of North Carolina on March 2, 1896, memorialized the Congress of the United States (Sen. Doc. 143, 54th Congress, 1st Ses.), praying that Congress should provide for payment to them of their per capita shares directly and did not recognize the Cherokee Nation as their trustee and in the proceedings of this case the Eastern Cherokees of North Carolina as a band and the Eastern Cherokees of Indian Territory as a band and acting together and as

one body under the authority of the jurisdictional act, have protested, and do protest, against the Cherokee Nation, either as a body politic or as a tribe, acting in any capacity for them as trustee, representative or otherwise.

The United States is and has ever been the Sole Trustee of the per capita due all the Eastern Cherokees by Art. 9, Treaty 1846, and the appropriation Act of July 2, 1836.

The Cherokee Nation, through its National Council, has never claimed this fund as against the Eastern Cherokees, but on the contrary the Cherokee National Council did by Act of December 7, 1900, concede the right of the Eastern Cherokees to this very fund, and declared that if the fund could be collected, it should be paid to the Eastern Cherokees exclusively, in the following language:

"Be it further enacted that all moneys which may be collected belonging to the $5,000,000 treaty fund of 1835, shall be paid out per capita when collected to the persons entitled thereto, as set forth in the Ninth Article of the Treaty of 1846." (Rec. 40, par. 5.)

The Cherokee National Council never thereafter departed from this expression, which is the latest authorized expression of the Cherokee Nation as a body politic.

The Cherokee Nation as Trustee.

In effect the judgment of the Court of Claims was that the judgment should go to the Cherokee Nation, but that the fund belonged to the Eastern and Western Cherokees. Whether the court regarded the Cherokee Nation as a government, a body politic, or as a tribe does not clearly appear from the judgment, but it is obvious that

in some capacity judgment was rendered the Cherokee Nation as a representative of the Eastern and Western Cherokees.

Neither as a tribe nor as a body politic can the Cherokee Nation recover as Trustee of the Eastern Cherokees, because:

First. The Eastern Cherokees have full capacity to sue under the jurisdictional act and are representing themselves in this controversy.

Second. The Cherokee Nation could not receive judgment as Trustee for the Eastern Cherokees, because the United States is the trustee of the Eastern Cherokees under the Appropriation Act of March 2, 1836 and Article Nine of 1846, pledging the fund then appropriated to the Eastern Cherokees per capita. The Eastern Cherokees have not released the United States as their trustee and will not do so.

Third. The Cherokee Nation as our trustee has not brought any suit, but denies the trust.

Fourth. As a body politic it has no standing as suitor in this case.

Moreover, Congress, by the Acts of June 7, 1897, June 28, 1898 and July 1, 1902, has practically abolished the Cherokee Nation and has utterly deprived it of the capacity to act as trustee for anyone. It is no longer a Government; it is an empty name. It has no legislature; it has no judiciary and its chief is merely a clerk to sign allotment deeds. By section 19 of the Act of June 28, 1898, Congress forbade the Cherokee Nation thereafter to receive funds due to the citizens of that Nation but directed that the officers of the United States should perform that duty.

The right or power of the Cherokee Nation to act thereafter as Trustee or to receive judgments as such, was abolished.

How can the Cherokee Nation receive judgment under such a state of facts? and how can it be allowed to receive judgment as our trustee?

The Cherokee Nation as trustee is not entitled to judgment because it has brought no suit as trustee; it is not even a claimant as trustee. It denies that it is a trustee. Its right or power to act as Trustee is abolished. It therefore is not entitled to judgment as trustee.

Shall an extinct and defunct body politic receive judgment against the Eastern Cherokees as our trustee, when it has made no claim; has filed no petition; has denied any trust relation, and has attempted to destroy the claim of the Eastern Cherokees; when Congress has expressly deprived it of the power to act as trustee and when the court has been obliged to recognize the United States as trustee for funds confessedly due the Cherokee tribe in this very case?

The Eastern Cherokees, being in court with full capacity to sue, have established the fact that they are the rightful claimant; that there is no other rightful claimant; that no one can pretend to represent them since they have the legal right to represent themselves. They therefore humbly pray the court to direct a judgment to be entered to the Eastern Cherokees directly for the full amount claimed by them of $1,111,284.70, with interest at 5 per cent. per annum from June 12, 1838, until paid, without any deduction on account of attorneys' fees contracted by the Cherokee Nation assuming to be a body politic, under contract of January 16, 1903, and subject alone to the fees and expenses to be allowed by the Court of Claims in pursuance of the Act of March 3, 1903. (32 Stats., 996.)

The Per Capita Fund of the Eastern Cherokees Cannot be Charged With the Obligation Incurred by the Cherokee Nation as a Body Politic in this Attempt to Defeat the Eastern Cherokees.

The Eastern Cherokees insist that the per capita fund due them by the United States is not chargeable with the expense of attorneys employed by the so-called Cherokee Nation to defeat them of their rights.

The Cherokee Nation, in this case, has attempted to deprive the Eastern Cherokees of the fund in question. If the Cherokee Nation had recovered in the contention made in its behalf the Eastern Cherokees would have been defeated of their rights. As a body politic (if it existed), the Cherokee Nation (if not defunct) could have exercised its own discretion as to the disposition of this fund. It could have dissipated it. It could have utterly deprived the Eastern Cherokees even those who are members of the tribe, of any benefits therefrom.

Will a Court of Equity allow the claimant, the Cherokee Nation, as a body politic, defunct, being defeated in its pretensions, nevertheless to tax the fund of the Eastern Cherokees with the cost of the attempt to defeat the owners of the fund.

The Cherokee Nation, in this case, has denied any trust relation to the Eastern Cherokes and has sought the fund for itself.

Shall a Trustee who seeks to obtain the trust fund for himself, be allowed, when defeated, to charge the trust fund with the expense of an attack on the trust?

The Cherokee Nation has attempted to gain the fund for itself. It has denied the right of the Eastern Cherokees to recover. If the Eastern Cherokees receive this

fund they receive it in spite of the Cherokee Nation, and in the face of the relentless opposition of counsel representing the Cherokee Nation and it would be most inequitable that the Eastern Cherokees should not only pay the expense of conducting their own suit, but should also be required to pay the expense of the suit of their antagonists. It would be an entirely new principle in law; that the successful suitor should be required to pay the counsel of his implacable antagonist.

The Eastern Cherokees therefore insist that their per capita be not diminished by virtue of the contract made on behalf of the Cherokee Nation as of January 16, 1903, since such contract was not made in their interest, but made against their interest and to defeat them if possible of their rights.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court
FILED
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JAMES H. McKEN

UNITED STATES, APPELLANT,
vs.
THE CHEROKEE NATION.
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THE EASTERN CHEROKEES, APPELLANT,
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Appeals from the Court of Claims.

Reply Brief of Eastern Cherokees to the Brief for the United States.

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Reply Brief of Eastern Cherokees to the Brief for the United States.

Counsel for the United States insists that the United States is not indebted to the Eastern Cherokees and makes the following argument, to wit:

I.

First That under the treaty of 1835 the Indians well understood that they were to pay the cost of their own removal, and that the $600,000 allowed by the Senate was merely an addition to the $5,000,000 fund, an enlargement of that fund, and no commitment on the part of the United States to pay the cost of the removal if it should exceed that sum.

The Eastern Cherokees have fully answered this contention (E. C. brief, 40 to 70). The fact is the Indians understood the precise contrary, and it is so expressed on the face of supplementary article 2 of the treaty. It is as follows (italics ours):

> "Art. 2. Whereas the Cherokee people have supposed that the sum of $5,000,000 fixed by the Senate in their resolution of the day of March, 1835, *as the value* of the Cherokee lands and possessions east of the Mississippi River was *not intended to include the amount 'which may be required to remove them.'* . . . Which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question, and—
>
> "Whereas the President is willing that this subject should be referred to the Senate for their consideration, and *if it was not intended by the Senate* that the above mentioned sum of $5,000,000 should include the objects herein specified, *in that case* further provision should be made therefor as might appear to the Senate to be just."

Obviously, the Cherokees who signed this treaty did not understand that any part of such removal was included or

to be included in the $5,000,000 fund. They regarded the value of their lands and possessions $20,000,000. The Senate, fixed the value at $5,000,000. The $5,000,000 fund was *the value* of their lands and possessions as fixed by the Senate. The United States was already under treaty obligation to pay the cost of removal and subsistence (Art. 8, 1828), and why should their property be used to discharge this obligation of the United States? Even the Senate itself, by this article, is put on record as declaring that the above mentioned sum of $5,000,000 should not include removal expenses. It was only *"in that case"* that they were to make further provisions. It is most significant that they made a provision *estimated as more than sufficient* to pay the entire cost of removal, and thus demonstrated the Senate's intention (to whose decision the question had been left), to pay the entire cost of removal and charge the Cherokees with no part thereof.

Congress on July 2, 1836, immediately confirmed the interpretation of the Senate by appropriating the $5,000,000 purchase money in one act to the Cherokees and the $600,000, as a different and distinct appropriation for removal expense.

But if the argument were true, that the $600,000 and the $1,047,067 were merely an enlargement of the $5,000,000 fund, then, the United States, by the terms of the treaty, would be forbidden to take credit for exceeding the amount of $20 per capita for removal, and $33.33 for subsistence, which was the commutative rate agreed on in article 8 of that treaty (Record, 86), and this would make the Government's indebtedness a far larger sum than allowed by the account rendered in 1894.

The United States not only committed itself, by supplementary article 2 of this treaty, to pay the entire cost of removal, but its representatives continued to ex-

plain, in 1836 and 1837, to the Indians that the United States would pay the cost of removal and subsistence, as through the War Department's instruction to United States Indian agent Curry (Exhibit 1.16), and through its enrolment agent, Lieut. Van Horne (Exhibit 1.22).

In the case of the Choctaw Nation *vs.* The United States (119 U. S., 1), it is said in the syllabi:

> "The relation between the United States and the Indian tribes, being that of a superior towards an inferior who are under its care and control, its acts touching them and its promises to them, in the execution of its own policy and in the furtherance of its own interests, are to be interpreted *as justice and reason demand* in cases where power is exerted by the strong over those to whom they owe care and protection. (U. S. *vs.* Kagama, 118 U. S., 375, cited and applied)."

It is obvious, under this rule of interpretation, that—

> "the sum of $5,000,000 fixed by the Senate in their resolution of the——day of March, 1835, as *the value* of the Cherokee lands and possessions east of the Mississippi River"—

could not be used by the United States to pay its own obligations, incurred "in the execution of its own policy and in the furtherance of its own interests," regardless of the treaty of 1835, or of the treaty of 1828.

We have shown that it was made by an unscrupulous agent and enforced by military power. The treaty of 1835 was to all intents and purposes an act of sovereign power, and it should be interpreted as "justice and reason demand." It would not be just, it would not be reasonable, to charge the value of the property of the Indians as fixed by the Senate with the cost of removal, because

removal expense was a Government obligation, and because such expenditure was purely for the benefit of the Government. The removal was greatly desired by the United States and bitterly opposed by the Cherokees, thousands of whom lost their lives because the Government insisted upon the removal.

The Indians who made the treaty undoubtedly believed that the United States would pay the cost of removal. The President and his Commissioner negotiating the treaty thought the removal would only cost $255,000 and spoliations $250,000, and the Congress made the appropriation accordingly, but made it for a sum larger by $95,000 than required by this estimate. And in 1838 Congress again appropriated the full amount estimated as necessary to pay the entire cost of removal. The fund appropriated expressly for removal was abundant, and, of course, the Indians understood the United States would pay the cost of removal out of the abundant funds appropriated for such purpose.

There can be no doubt that when Congress in 1836 appropriated a sum believed to be more than sufficient to pay the entire cost of removal, and when Congress in 1838 again provided a sum actually more than sufficient to pay the estimated cost of removal, Congress well understood that the cost of removal was not chargeable to the $5,000,000 fund, but was chargeable to the Treasury of the United States. There is no doubt whatever that the Indians so understood. The Indians had a right to so understand it, not only from the treaty and from the repeated assurances of the officials of the United States, but from these appropriation acts as well.

If the auditor's office had charged removal expenses to the fund appropriated for removal, as advised by opinion of Attorney-General B. F. Butler, the $5,000,000 fund would not have been touched.

II.

The second argument of Government counsel is as follows:

Second. "That the appropriation of June 12, 1838, was merely a further enlargement of the $5,000,000 fund, an addition thereto, and that the Cherokees understood that if this sum was not sufficient, the excess was to be charged to the $5,000,000 fund."

It is perfectly obvious that the Cherokees did not understand that removal expenses were to be charged to the $5,000,000 fund, if this sum was not sufficient.

The Secretary of War made the proposition to John Ross on the 18th day of May, 1838, in which it was expressly declared that he thought the expense of removal should be borne by the United States, and that application would be made to Congress for that purpose. Congress appropriated the full amount estimated as necessary, not only to pay removal costs, but *to aid in* paying subsistence expenses. It was not supposed that this sum was insufficient, of course, either by the United States or by the Cherokees. It was believed to be more than sufficient by everybody, and **it was more than sufficient.** (Brief, 63).

The astonishing feature of this matter is, that the amount thus appropriated by Congress for this removal was left untouched in the Treasury of the United States until 1839, the removal having taken place in 1838, and no part of it was then used for removal. But the expense of removal in 1838 was entirely taken from the $5,000,000 fund by the War Department. This was in direct violation of the statute itself, which had provided that no part of the money appropriated for the removal should be deducted from the $5,000,000 fund. In the

face of this direction from Congress, the War Department used from this $5,000,000 fund, $1,111,284.70, and never did use any part of the $1,047,067 appropriated for removal, except subsequently to 1838 the inconsiderable sum of $49,095.31 (Rec., 90, pars. 2 and 3).

This is the transaction which the Government counsel must now explain. It is impossible to explain it.

Government counsel (60) quotes with approval Senator White's report, that the money paid the Cherokees in 1836 "as the difference in value between the countries" was "a very liberal consideration on the part of the Federal Government," and referring to the $1,047,067 as a "voluntary" grant.

We have heretofore fully answered this argument (Sen. Doc., 392, 56th Cong., 1st Sess., p. 18) Exhibit 2.

There was no country exchanged. The Cherokees had owned the country west for ten years from 1828, and Senator White's report was not intended as any interpretation of treaties.

If the theory of the Government counsel, that the $600,000 appropriated July 2, 1836, and the $1,047,067 appropriated June 12, 1838, were merely additions to the purchase price of the lands and subject, not to the charges definitely directed by the appropriation acts, but to miscellaneous charges to which the $5,000,000 fund was subject, then Government counsel would be in a far worse position, because, then, credit could o ly be taken by the United States under the treaty, at the commutation rate of $20 for removal and $33.33 for subsistence, as the Cherokees emigrated themselves. In the Slade-Bender account the Government got credit for $1,382,172.91 on account of removal; but, under this theory of Government counsel, the United States would only be entitled to credit for removing 16,957 persons, the number fixed by the Supreme Court, at the rate of $53.33, making the sum of $904.373.33. This would add

to the amount found by Slade-Bender the sum of $477,799.57.

III.

Government counsel argues:

Third. That the Cherokee Nation made a contract with General Scott, in which it was distinctly understood that if the expense of removal exceeded the amount appropriated for that purpose, it should come out of the $5,000,000 fund.

Congress appropriated, July 2, 1836, and June 12, 1838, sums estimated as more than sufficient. The appropriations in fact for this purpose, $1,647,067, were more than sufficient to pay the entire cost of removal.

When the Government made the contract with John Ross and his associates, it was with the understanding that the cost of removal should be at the expense of the United States, whatever the cost. Nobody supposed the amount appropriated for that purpose was insufficient, or that there would be any excess. John Ross was only allowed by General Scott for removing these Indians, on contract, the sum of $776,399.04, as the contract made by the Government officials apparently contemplated an eighty days' journey. Nobody knew it would exceed eighty days, and the sum contracted to be paid John Ross, and which was paid John Ross on the eighty days' contract, could easily have been taken from the $1,047,067 without exhausting it, so that this argument of Government counsel is entirely unwarranted, and besides it is contradicted, in numerous particulars, by the correspondence between the Cherokees and the Government officials, as we have most abundantly pointed out in our memorial to Congress filed in this case. Sen. Doc. 392, 56th Congress, 1st Session.

The fact is, the captive Cherokees, referred to, denied

the treaty of 1835 as a fraud on them and on the United States. They declared in numerous printed protests that they would not recognize it in any manner whatever. The court has found in this case that the Eastern Cherokees never conceded themselves to be a party to it until 1846 and then only as therein set forth. It is obvious that since these Cherokees denied the treaty and did not recognize it, they can not be held at the same time to have made a contract binding themselves to the proposition that removal expenses should come out of a $5,000,000 fund, which they then utterly repudiated.

IV

Government counsel argues:

Fourth. That the Cherokees understood that the final settlement of John Ross was to come out of their own funds.

We have already shown the contrary was the case. The findings of fact in which Government counsel acquiesced in this case are a sufficient answer to this pretension, because the court found that the treaty of 1846 was entered into "**to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be** (Record, 93)." They recognized no $5,000,000 fund until 1846 and made no contract with regard to it, and could have made none, because they insisted that the treaty under which the $5,000,000 fund arose was not binding on them; that they would not recognize it in any respect whatever. This entire record is set up at length in Sen. Doc. 392, 56th Congress, 1st Session, filed in this case. The Cherokees in their memorial, in regard to this treaty, said:

> "We reject all its terms. We will receive none of its benefits. If it is to be enforced upon us, it will be by your superior strength. We shall offer

> no resistance, but our voluntary assent never will be yielded. We are aware of the consequence; but while suffering in all its bitterness, we shall submit our case to an all-wise and just God, in whose province it is to maintain the case of suffering innocence and unprotected feebleness" (43 *Ibid.*, para. 5).

No act at variance with this emphatic position was taken by the Cherokees until they agreed to the treaty of 1846.

The correspondence referred to by Government counsel does not warrant any other understanding than this.

The committee of captive Cherokees who determined upon emigration declared in the face of their resolution that, "It was under a special understanding with the Honorable Secretary of War," (33 *Ibid.*, sec. 3.) and John Ross, in his letter of July 23, 1838, proposed that the compensation should be paid by the United States (34 *Ibid.*, sec. 3).

Gen. Winfield Scott, in his letter of July 25, 1838, said:

> "The United States, through me, are willing to stipulate to pay over to the Cherokee functionaries, from time to time, such portions of the *moneys appropriated for the emigration* as may seem reasonable and proper for and to carry it out" (34 *Ibid.*, sec. 10).

And the Cherokee committee, in authorizing John Ross to receive money from General Scott, only authorized him—

> "to enter into such further arrangements with the commanding general, in relation to the payment of such *sums of money by the United States*, as may be necessary for the removal and subsistence of all the Cherokee people" (35 *Ibid.*, sec. 1).

The money appropriated for this purpose (Rec., 90, sec. 1), however, was not used. It was left in the treasury, while the $5,000,000 fund was used.

Government counsel lays great stress upon General Scott's comment that the Cherokees were interested in an economical administration of the fund appropriated for their removal, and argues therefrom that the Cherokees understood this money would not be paid out of the sums appropriated for that purpose, but out of the $5,000,000 fund, which was not appropriated for that purpose.

General Scott said in his letter of August 1, 1838 (italics ours):

> "I repeat that I do not absolutely reject or cut down your estimate in putting down the rations at 16 cents each. The whole expense of the emigration is to be paid *out of the appropriations already made by Congress*, the general surplus of which is to go to the Cherokee Nation in various forms; therefore they have a direct general interest in conducting the movement as economically as comfort will permit" (38 *Ibid.*, 4).

General Scott in his letter of August 2, 1838 said:

> "As the Cherokee people are exclusively interested in the cost as well as the comfort of the removal, I do not feel myself at liberty to withhold my sanction."

This language applies with precision to the appropriation of $600,000 of July 1, 1836 and $1,047,067 of June 12, 1838, and it does not apply to the $5,000,000 fund, which was not appropriated for removal.

The use of the term "Trust Fund" in General Scott's testimony (Gov. Brief, 68), is seized upon as a reference to the $5,000,000 fund with which General Scott had nothing to do and to which he did not refer. His reference was to the removal fund appropriated to remove the Cherokees, the balances of which were held in *trust* for subsistence and education.

Government counsel argues that the Cherokee resolution of November 11, 1840, contemplated charging the $5,000,000 fund with the expense of the emigration.

It did nothing of the kind. On the contrary, the Cherokees did not recognize the $5,000,000 fund, and in this resolution referred to (Sen. Doc. 392, 56th Congress, 1st session, page 51) stated explicitly that delays in the emigration had "consequently enlarged proportionately the cost of the emigration *to the United States*" (*Ibid.*, 51, sec. 2), and only authorized John Ross to make settlement on behalf of the Cherokee Nation of the sum due, "as stated in the emigration claim" (*Ibid.*, 51, sec. 8). The emigration claim referred to was as follows:

> "The United States in account with the Cherokee nation for the expense incurred in the removal of the Cherokees *under an arrangement with Major General Winfield Scott.*"

John Ross was, to all intents and purposes, the "Cherokee Nation" in this transaction, and the Hon. Felix Grundy, Attorney-General of the United States, in his opinion of March 20, 1839 (3 Op., 432), declared that the employment of John Ross was "a moral necessity."

The account rendered, above referred to, will be found on page 56, Report 288, H. R., 27th Congress, 3rd session. The total amount was $1,357,745.86¼, which was credited—

> "By cash received of Capt. J. Page, U. S. *Disbursing Agent*, on signed requisitions, drawn on Major General Winfield Scott, $776,398.98."

The evidence on the John Ross contract will be found in Sen. Doc. 392, Fifty-sixth Congress, first session, pages 47 to 52 inclusive, filed in this case. The claim of John Ross was against the United States. He had no reason to believe that the United States would attempt to charge

the account due him to the Cherokees out of the $5,000,000 fund, when they did not recognize the fund itself, and when at the time of this settlement the President of the United States, John Tyler, on September 20, 1841, promised John Ross to make a treaty with the Cherokees which should give to the nation full indemnity for all wrongs which they may have suffered (E. C. Brief, 47). (Sen. Doc. 140, 28 Cong., 2d Sess.)

V.

Government counsel agues:

Fifth. That by the treaty of 1846 it was well understood by the Cherokees that the cost of removal should be charged to the $5,000,000 fund, and that the Senate in striking out the twelfth article had refused to consider the claim that removal was not chargeable to the $5,000,000 fund. That removal was charged, in the Western Cherokee case, to the $5,000,000 fund, and therefore that case is a precedent for charging the $5,000,000 fund with removal in making settlement with the Eastern Cherokees.

We have answered this contention heretofore (E.C. Brief, 76 to 94), but for further answer point out that the preamble of the treaty of 1846 expressly declares it was drawn for the purpose of *settling the claims* of the Cherokees against the United States, not for annulling them, and Attorney-General Crittenden, immediately after the treaty was made, April 16, 1851, in an official opinion, said:

> "The treaty of 1846 does not expressly, nor by implication, abrogate any of the interests of the Cherokees in the distribution per capita provided for in articles 12 and 15 of the treaty of 1835.

> The Treaty of 1846 intends to provide for satisfaction of those claims, not to forfeit, repeal, or annul any of them" (5 Op., 320).

The construction of Government counsel would not give the Cherokees the "fair and just settlement" promised by the ninth article of the treaty of 1846. Such a settlement would not "exhibit money properly expended under the Treaty of 1835," but would exhibit money improperly expended thereunder.

Government counsel argues that article 9 intended to declare that *all sums* paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians, etc., were *properly* expended under the treaty, and that article 9 really intends to commit the Cherokees to the proposition that all sums paid under all heads were properly chargeable to the Cherokees. If this were true, then the article should not have proposed a "fair and just settlement under the treaty of 1835," and it should not have proposed to exhibit "all money properly expended under said treaty," because under this interpretation article 9 would mean that whether said sums were properly expended or not under that treaty, nevertheless, under the treaty of 1846, they were chargeable.

On this theory there was no need for a treaty at all as far as the poor Cherokees were concerned.

Government counsel quotes, with approval, the letter of the Department of Justice of December 2, 1895 (Sen. Doc. 16, 54th Congress, 1st Session, U. S. Brief, 101), as follows:

> "If nothing more was intended than a mere reiteration of the obligations of the Treaty of 1835, without any attempt to settle its disputed construction, it is difficult to imagine any occasion for the treaty. The language which follows that just

> quoted removes all doubt, viz, 'and shall embrace all sums paid for improvements, ferries, spoliations, removal, subsistence,' etc. Certain purposes for which it was agreed that money had been 'properly expended under such treaty' are here recited, and that of removal is one of them."

The treaty of 1846 was not drawn for the purpose of settling any disputed construction of the treaty of 1835. The Cherokees denied its existence as a treaty and refused to be bound by it or any part of it.

This letter finds it difficult to *imagine* any occasion for the treaty unless the Cherokees intended to relinquish what had been promised them. If the writer of this letter had known the facts, or if he had given any hearing to the Cherokees before writing it (which he did not), the gross error of this letter would not have been committed. The **"occasion"** for this treaty was a bloody factional war among the Cherokees; the necessity of making the Eastern and Western Cherokees parties to the treaty of 1835–36, which they had never conceded themselves to be; and to pay [not to deny] the Cherokees the money which had been promised them.

The triumphant discovery that removal was one of the things "for which it was agreed that money had been properly expended, under such treaty," and the implied argument that therefore it was properly chargeable to the $5,000,000 fund is obviously absurd.

Of course money had been properly expended for removal under the treaty and the laws relating thereto, but that is not the question. The question is whether such expenditure was properly chargeable to the $5,000,000 fund.

We have conclusively shown that such expenditure was not properly chargeable to that fund under such treaty; that Congress appropriated a sum more than sufficient to pay the entire cost of removal; that

the accounting officers had, in violation of law, charged the $5,000,000 fund with removal expenses, and had not charged the sum appropriated for removal, with removal expenses, as they ought to have done under the plain tenor of the appropriation act, and under the opinion of Attorney-General B. F. Butler (3 Op., 297), who had expressly passed upon this question for their benefit.

We have shown that if the accounting officers had done their duty as instructed by the opinion of Attorney-General Butler, this erroneous charge against the $5,000,000 would not have occurred, and the Eastern Cherokees would have received the sum now in controversy, to-wit, $1,111,284.70, with interest, in the settlement of 1852, as a per capita payment.

Government counsel believes that "all sums" paid under "improvements" were properly paid and should be charged to the $5,000,000 fund under article 9. But article 3 declares the contrary; that certain sums paid under that head had been improperly expended and should be reimbursed to the $5,000,000 fund; thus contradicting the inference of Government counsel.

Government counsel thinks that "all sums" paid under the head of "spoliation" were properly charged to the $5,000,000 fund; that article 9 can mean nothing else than this. But article 3 contradicts this inference and directs that certain sums which had been paid, under the head of "spoliation," out of the $5,000,000 fund, (not justly chargeable to that fund), must be reimbursed, so that article 3 contradicts this inference.

Government counsel thinks that "all sums" paid under "claims" were properly chargeable to the $5,000,000 fund, but article 3 expressly declares that various claims have been improperly paid out of the $5,000,000 fund and were not justly chargeable to that fund, thus contradicting the inference with regard to "claims."

Government counsel thinks that "all sums" paid for

"subsistence" were by the ninth article agreed to have been properly charged to the $5,000,000 fund, but article 11 of the same treaty leaves this as a question in dispute to the Senate of the United States, and the Senate decided, in effect (September 5, 1850), that no amount paid for subsistence was properly chargeable to the $5,000,000 fund.

Government counsel thinks in like manner, that he is justified in drawing the inference that "all sums" paid for removal were chargeable to the $5,000,000 fund. This inference is contradicted by article 3, which declares that the United States should "reimburse all other sums paid to any agent of the Government and improperly charged to said fund." The fund paid for removal expense was paid to Captain John Page, an agent of the Government and by him expended, and under article 3 should be reimbursed. Captain John Page, disbursing agent of the United States, paid John Ross alone out of the $5,000,000 fund, $776,398.98 (H. R. Report 288, 27th Congress, 3rd Session, page 56).

The interpretation (by inference) of Government counsel that article 9 intended to authorize "all sums" paid for improvements, spoliations, claims, removals, subsistence, etc., to be charged to the $5,000,000 is not only irreconcilable with other articles of the treaty, 3, 9 itself, 10 and 11, but is entirely at variance with the plain common sense meaning of this treaty, which was entered into to reconcile the Cherokees to the treaty of 1835–36 and to pay them what was promised by that treaty.

The inference of Government counsel is forbidden by the very next article of the treaty (Art. X).

> "Article X. It is expressly agreed that nothing in the foregoing treaty contained, shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now

residing in the States east of the Mississippi River had, or may have, under the treaty of 1835 and the supplement thereto."

Yet Government counsel would construe the preceding article 9 so as to take away over $1,000,000 from the per capita of these Cherokees. Under any rule of interpretation much less under the rule of interpretation laid down in Choctaw Nation *vs.* The United States, that the acts of the United States in dealing with the Indians "in the execution of its own policy and in the furtherance of its own interests, are to be interpreted as justice and reason demand," the interpretation of Government counsel is entirely impossible.

On January 4, 1843 (H. R. Report 288, 27th Congress, 3d Session, page 52), the Secretary of War, J. C. Spencer, submitted to the House of Representatives a report of the second auditor showing that the sum of $674,527.97 had been paid to Harrison & Glasgow for rations for the Cherokees and taken out of the $5,000,000 fund; the same auditing department of the United States (when the Senate was required to decide whether the $5,000,000 fund was chargeable with the cost of subsistence) reported to Congress that the amount which had been so charged was only $189,422.76, which was reimbursed by Congress, to this extent only, September 30, 1850 (Rec., 96).

This is the kind of bookkeeping which has been the undoing of the poor Cherokees.

If the United States had given the Cherokees a clean transcript from the trust ledgers of the auditing department the injustice of these accounts would have been made manifest, and the exposure of the auditing department complete.

The Eastern Cherokees of North Carolina, who never removed west, only received as a per capita for their land

cession $56.31 in 1852, excluding interest (Record, 109).

There were 16,321 Eastern Cherokees all told (Rec., 109); they sold the United States 7,882,240 acres (Rec., 110), which equals 485 acres per capita. For the purchase price of 485 acres the Indians, who did not remove, received per capita only $56.31, excluding interest. If they were paid the full amount they now claim, including this $56.31, they would only receive a total of $124.78 (Rec., 109), excluding interest, about 25 cents an acre, after waiting 70 years.

If "reason and justice" be done these people, the amount they now claim will be paid them. This would be but a pitiful compensation for the country these helpless Indian children were compelled to relinquish by their "Great Father."

Government counsel enlarges upon article 12, an item proposed by the Western Cherokees and omitted from the treaty.

We are therefore compelled to set it out in order to show that there is nothing whatever in such contention.

> "Article 12. The Western Cherokees, called 'Old Settlers,' in assenting to the general provisions of this treaty, in behalf of their people, have expressed their fixed opinion that, in making a settlement with them upon the basis herein established, the expenses incurred for the removal and subsistence of Cherokees, after the 23d day of May, 1838, should not be charged upon the $5,000,000 allowed to the Cherokees for their lands under the Treaty of 1835, or on the fund provided by the third article of the supplement thereto [$600,000], and that no part of the spoliations, subsistence, or removal provided for by the several articles of said treaty and the supplement thereto, should be charged against them in their settlement for their interest in the Cherokee country, east and west of the Mississippi River. And the delegation of 'Old Settlers,' or 'Western Cherokees,' propose that the question shall be

submitted with this treaty to the decision of the Senate of the United States, of what portion, if any, of the expenditures made for removal, subsistence, and spoliation, under the Treaty of 1835, is properly and legally chargeable to the $5,000,000 fund. And they will abide by the decision of the Senate."

(The removal expense prior to May 23, 1838, had not touched the $5,000,000 fund.)

While this was a Western Cherokee proposition exclusively, with which the Eastern Cherokees were not concerned, there was good and sufficient reason to omit it from the treaty, because, under articles 4 and 11, every item in article 12, was otherwise provided for.

Under the plan proposed by article 4, at $20 per capita for removal, the $5,000,000 fund would not be touched for removal expenses in settling with the Western Cherokees, as will appear from the following table, taken from the opinion of the Supreme Court of the United States (148 U. S., 477):

The treaty fund [$5,000,000 and $600,000]		$5,600,000 00
For 800,000 acres of land	$500,000 00	
For general fund	500,000 00	
For improvements	1,540,572 27	
For ferries	159,572 12	
For spoliation	264,894 09	
For debts, etc	60,000 00	
For removal of 16,957 Cherokees at $20 each	339,140 00	
	3,364,178 48	3,364,178 48
Giving as the residue to be divided per capita		2,235,821 52
One-third due the Western Cherokees		$745,273 84
Less payment September 22, 1851		532,896 90
Leaving a balance of		212,376 94

(Record, 102.)

It will be seen from this settlement that the $300,000, appropriated primarily for removal, was not exhausted when the removal of 16,957 Cherokees was, charged against it, and that the $5,000,000 fund was therefore, not touched by removal expenses in this settlement with the Western Cherokees.

It is obviously just that the United States should receive credit out of the $600,000 appropriated for removal and spoliations to the full extent of the amount so appropriated and expended for that purpose. The $5,000,000, appropriated to the Cherokees in payment of their land, was not subject to the charge of removal, and was not charged with the expense of removal in making the settlement with the Western Cherokees, as clearly appears. The mere fact that, for convenience of stating the account, two appropriations of $5,000,000 and $600,000 are placed together as an aggregate, does not warrant the theory that the cost of removal was charged against the fund not appropriated for that purpose, any more than it would be right to say that the $500,000 agreed to be paid for the neutral lands was paid out of the $600,000 appropriated for removal. One conclusion is as unreasonable as the other.

The question of subsistence was provided for in the eleventh article, to be left to the United States Senate, and therefore there was nothing in article twelve not otherwise covered by the other articles of the treaty. It was consequently omitted.

VI.

Government counsel argues:

Sixth. That the receipts of the Eastern and Western Cherokees in 1851 and 1852 were receipts in full and binding as against the Eastern Cherokees, although not against the Western Cherokees.

The Cherokee National Council, on November 27, 1851, protested against this settlement in the terms set forth

in the findings of fact by the Court of Claims (Record, 98), which was transmitted to the Commissioner of Indian Affairs in April 1852, before the Cherokees received any of this money. The United States contracted with the Cherokee authorities as the representatives of the communal owners in acquiring the lands by the treaty of 1846, and the same Cherokee authorities acted for the communal owners in protesting against the proposed partial payment. The Government is estopped from denying the right of the Cherokee authorities to protest on behalf of the Eastern Cherokees.

The Cherokees having made a proper protest, before receiving the payment, in the most impressive way known to them, by resolution of the National Council of November 27, 1851, of course the cases of U. S. *vs.* Adams and U. S. *vs.* Childs (Brief, 91) have no application or force.

The act of Congress did not require the Eastern Cherokees, however, to execute a full and final discharge for all claims and demands whatsoever on the United States, without exception, but expressly excepted **"such money and lands, if any, as the United States may hold in trust for said Cherokees"** (Record, 100).

By the act of July 2, 1836, the United States had appropriated the sum of $5,000,000 (less $500,000 paid for "neutral land"), which was placed to the credit of the Cherokees in the Treasury of the United States. This fund undoubtedly was a trust fund held by the United States "in trust" for the purposes set forth in the treaty, among others "in trust" for per capita purposes. By article 15 of the treaty of 1835–36, it was provided that the balance of this fund should be paid to the Eastern Cherokees per capita. The same provision was made by article 9 of the treaty of 1846, and this per capita fund was held "in trust" for the Eastern Cherokees, the very people who were required to execute the receipt of 1852. This receipt made an exception of money held "in trust"

for said Cherokees (Record, 100). The receipt of 1852 would be no acquittance to the United States as against this per capita fund, because the fund was held "in trust" for these Cherokees.

Independently of these two complete defenses, that they were not required to receipt for funds held in trust for them and made a protest against the proposed settlement before receiving the payment of 1852, the whole matter was opened by the agreement of December 19, 1891, and again by the jurisdictional acts of July 1, 1902, and March 3, 1903.

When the United States authorized the Cherokees to bring suit for any sum due them under the treaties, the jurisdictional acts of 1902 and 1903 would have reopened the case as against this receipt; otherwise the acts would have been a mockery, since both the Cherokees and the United States well knew of the notorious settlement of 1852 and the receipt given at that time.

The account rendered by the United States in 1894, which proposed to render a statement of the "*moneys due*" under the treaties and the laws relating thereto and authorizing the Cherokees to bring suit for the correction of any errors in said accounting, itself reopened the entire question.

Government counsel argues:

Seventh. That the account rendered by the United States in 1894 was not binding on the United States because certain experts employed by the United States in making such an account, exceeded their authority, and, on the assumption that the $5,000,000 was not chargeable with removal, rendered an account not contemplated by the Cherokee agreement of 1891.

The experts did not exceed their authority.

By the agreement of 1891, it was the duty of the

United States to deliver to the Cherokees a complete account of "*moneys due.*"

This account to be rendered was not to be a mere copy of a former erroneous account; it was to be a complete account of *moneys due.* It would have been absurd to have delivered the Cherokees a transcript of the accounts of which they had complained.

By the treaty of 1866, article 22, set out below, the Cherokees had already a complete right to examine the Government accounts whenever they liked through an agent employed by them for that purpose and free access to all accounts, and it would have been no relief to them to have received a transcript of accounts showing the errors of which they had complained. They knew about these errors and they complained of them for years:

> "Article 22. The Cherokee National Council, or any duly appointed delegation thereof, shall have the privilege to appoint an agent to examine the accounts of the nation with the Government of the United States, at such time as they may see proper, and to continue or discharge such agent, and to appoint another, as may be thought best by such council or delegation; and such agent shall have free access to all accounts and books in the executive departments relating to the business of said Cherokee Nation, and an opportunity to examine the same in the presence of the officer having such books and papers in charge."

It is evident that the Cherokees, in asking an account to be rendered of moneys due in the agreement of December 19, 1891, were asking something more than they already had. They already had the opportunity at any time to make a copy of the accounts, as they stood with their errors, and it would have been no additional advantage whatever, unless the accounting proposed in such agreement meant something more than they already had.

In the proposed accounting it was agreed—

> "If it shall be found, upon such accounting, that any sum of money has been so withheld, the amount shall be duly appropriated by Congress."

If the accounting proposed was merely to be a copy, it meant that nothing would be found due. Why then this language, "if it shall be found upon any accounting that any sum of money has been so withheld." The accounts, as they were, denied any indebtedness. A copy of them could not possibly have found any money due, and, therefore, this language would have no significance whatever.

The positive determination that the $5,000,000 fund was not chargeable with removal expense was authorized and unavoidable in rendering a correct account. It was not "an assumption" by the experts employed by the United States.

Their language, after giving a complete history of the transactions involved, and quoting article 9, is as follows:

> "This article provides substantially, as will be seen, for a settlement with the Cherokee Nation upon the basis of the treaty of 1835, and for the deduction from the sum of $6,647,067.00 of the charges properly to be made against it, under the terms of that treaty, and the distribution per capita of the residuum. It is evident from the use of the word 'properly' in this section that it was not the intention to increase or enlarge the deductions which were to be made from the treaty fund, either in numbers or in character. Whatever was properly chargeable under the fifteenth article of the treaty of 1835, was also chargeable under the ninth article of the treaty of 1846, but nothing more" (Ex. 1, 29).

This is not "an assumption" by the experts, it is a declaration of principle which they were authorized to

make, and which they were compelled to make in order to render a complete account "of moneys due".

Attorney-General John J. Crittenden, in his opinion of 1851, held that the treaty of 1846 does not expressly nor by implication abrogate any of the interests of the Cherokees in the distribution per capita provided for in articles twelve and fifteen of the treaty of 1835, that the treaty of 1846 intended to provide for the satisfaction of those claims not to forfeit, repeal, or annul any of them (5 Op., 320). Attorney-General Butler held that the cost of removal was the first charge on the $600,000.00 (3 Op., 320).

Attorney-General H. S. Legare (4 Op., 73), held July 20, 1842, that the $5,000,000 fund included nothing but what is "expressed or necessarily implied in the treaty."

Under these opinions, these experts were under competent directions and fully justified in their conclusions, if indeed they were to render "a complete account of moneys due," under the treaty of 1835 or of 1846. Although authorized to construe the treaties it was not really necessary for them to construe the treaties. It had already been done by the highest law officers of the Government.

The Commissioners who negotiated the Cherokee agreement, took great pains to explain the purpose of the Cherokees in demanding this account and their own meaning in agreeing that the account should be rendered. They said:

> "The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.
>
> "Whatever that construction is the Indian must abide by. There is no appeal except to Congress. Without going specifically into details,

> the Cherokees claim that upon a just accounting, upon a proper construction of the treaties named, a large sum of money, **principal and interest**, will be found due them. . . . The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected."

If this means anything, it means that the Cherokees expected a proper account to be rendered, correcting previous error and making a just account, upon a proper construction of the treaties named. They alleged that upon such an accounting "a large sum of money, principal and interest, will be found due them." They therefore demanded that a complete account of moneys *due them* should be rendered, correcting any misconstruction of treaties in past accounts, if any misconstruction had been made, and giving them the right to go into court, if they should conclude that the account was incorrect or unjust; that they should have the right in that event to sue—

> "for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly, or illegally adjusted in said accounting."

If this language means anything, it means that the United States was to render not a copy of the account complained of, not a copy of an account showing nothing due, but "a complete account of *moneys due*" upon a fair construction of the treaties. The Cherokees believed, upon such an accounting, over a million dollars would be found due them, with interest from June

12, 1838, the per capita, of which they had been denied in 1852, and of which they had been complaining, as a national grievance, for forty years.

The Interior Department has its Attorney-General and a complete corps of legal advisers and in rendering this account did so under competent legal advice.

There is not the slightest doubt that the Cherokees understood that the United States would render them a correct account of moneys due, and not render them merely a copy of the account of which they complained, showing nothing due.

The account was to be rendered by the United States, the vendee of 8,000,000 acres of land, as a consideration moving the Cherokees, as vendors to sell. It was not to be rendered by experts or by individuals and **it was not rendered by experts or individuals. It was rendered by the United States** through its chosen agencies under the authority of Congress. **It was the act of the United States.**

Government counsel argues:

Eighth. That in any event interest should not be allowed, because the case of the Eastern Cherokees is different from the case of the Western Cherokees; that it is different in the particular that the accounting officers in making the Western Cherokee settlement were in error in charging the $5,000,000 fund with subsistence, whereas in the Eastern Cherokees case they were not in error in charging the $5,000,000 fund with the cost of removal.

Upon this argument the Eastern Cherokees are entitled to recover, because they have shown that the accounting officers of December 3, 1849, *were in error* in charging the $5,000,000 fund with the cost of removal.

The allowance of interest in the Eastern Cherokee case is identical in principle with the allowance of in-

terest by this honorable court in the Western Cherokee case.

When the treaty of 1846 was made, the Cherokees had for 11 years been denied the per capita promised, and in the settlement proposed they demanded interest. The United States agreed with the Cherokees (article 11) to leave the question of interest to the Senate, and that the Senate should determine—

> "whether the Cherokee Nation should be allowed interest on whatever sum may be found to be due the Nation, and from what date, and at what rate per annum."

This allowance of interest related to sums which "may be found to be due" thereafter, under the settlements proposed by this treaty, and it applies as much to the sum which may be found due now and which ought to have been found due then as it does to the sum which was then found due.

The Senate of the United States acted as umpire under article 11 of 1846, and on September 5, 1850, passed the following resolution:

> "*Resolved*, That it is the sense of the Senate that interest at the rate of 5% per annum shall be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th of June, 1838, until paid" (Rec., 96).

On April 3, 1893, the Supreme Court of the United States found that a certain sum of $212,376.94 "should have been found due" the Western Cherokees in the settlement of 1851, and that the decision of the Senate in respect to interest was controlling, and that, therefore, interest should be allowed from June 12, 1838, upon the balance indicated (148 U. S., 487).

The Supreme Court, through Mr. Chief Justice Fuller, said (italics ours):

> "By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was de-

> cided that interest should be allowed at the rate of five per centum per annum upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum *then found due was less than should have been found due by the amount of $212,376.94.*
>
> "Under section 1091 of the Revised Statutes, no interest can be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest; and in Tillson *vs.* The United States, 100 U. S., 43, it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed; was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest (9 Stats., 556, C. 91).
>
> "In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item $4,179.26, which stands upon different ground" (148 U. S., 478).

On numerous occasions thereafter Congress confirmed this principle and recognized the decision of the Senate as controlling, to wit: On September 30, 1850 (9 Stats., 556); on September 27, 1851 (9 Stats., 572); on August 23, 1894 (28 Stats., 451); on March 3, 1899 (30 Stats., 1235).

The case of the Eastern Cherokees is precisely the

same. It is identical with that of the Western Cherokees. The sum "then found due the Eastern Cherokees" in the per capita of 1852 "was less than should have been found due by the amount of" $1,111,284.70. Article II of that treaty provided that the question—

> "whether the Cherokee Nation should be allowed interest on whatever sum may be found to be due the nation, and from what date, and at what rate per annum."

And the Senate made the same decision precisely as to the Eastern Cherokees and Western Cherokees, at the same time and in the same manner.

It was determined by the same identical resolution of the Senate of Sept. 5, 1850 (supra).

The question of interest was a "subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself."

Indeed, the question of interest was also "a subject of difference while the negotiations were being carried on" in 1891, "the determination of which was provided for in the agreement of December 19, 1891" (R., 104, sec. 8).

The commissioners negotiating that agreement expressly say:

> "The Cherokees claim that upon a just accounting, upon a proper construction of the treaties named, a large sum of money, PRINCIPAL AND INTEREST, will be found due them" (R., 104, sec. 8).

This refers to the per capita promised them by treaty of 1835–36 and 1846, withheld from them in 1852, and which was due, with interest.

The Cherokee agreement of 1891 provided that this claim should be settled by the account to be rendered by the United States. It was settled, in the manner agreed on in the agreement of December 19, 1891, by the account rendered by the United States, that there was due

the Cherokees the sum they claimed, **with interest,** thus definitely determining the indebtedness in the manner provided by the agreement itself.

Under the principles laid down by this Honorable Court therefore, it has been twice authoritatively determined that this interest is due.

Indeed, the principles of justice would require interest to be paid under all the circumstances, the United States, as guardian, having used the money all these years over the protest of its wards.

When the United States rendered the complete account of moneys due, it was the bounden duty of the United States to endeavor to render it correctly and in the manner and for the purpose agreed on. The United States did do this, and found the sum of $1,111,284.70 due, with interest from June 12, 1838, to date of payment, as the balance of the per capita due under the ninth article of the treaty of 1846 (Ex. 1.27, sec. 1; 44 sec. 2). So that the United States is bound not only upon the treaty of 1846 to pay the interest, but also by the account rendered by the United States in pursuance of the contract of December 19, 1891.

Government counsel declares the allowance of interest in the account readered by the United States is an *ipse dixit* of the experts employed by the Government.

The Cherokee agreement of December 19, 1891, did not contemplate an accounting to be rendered by individuals, but by the United States, in a manner and form to be determined by the United States. The United States rendered the account. It was not done by the experts employed by the United States. They were merely a part of the machinery invoked for the rendering of this account. The Congress of the United States directed the mode by which this account should be rendered and authorized the Secretary of the Interior to employ experts.

When these experts were employed they were merely the instruments in the hands of the Interior Department, and their account was subject to review and was reviewed by the Commissioner of Indian Affairs and by the Secretary of the Interior and by their legal departments. When the Secretary of the Interior had reviewed this account and had adopted it and rendered it on May 21, 1894, to the Cherokees, it was the act of the United States, and not the act of the experts employed as one of the instrumentalities for the making of the account. If this be not true, then the United States must be held as incapable of acting through its own chosen agencies or of rendering the account proposed in the agreement of December 19, 1891, and ra ified by Congress March 3, 1893—a theory which is absolutely untenable. The United States was capable of carrying out and was authorized to carry out this agreement. It did carry it out and it did render the account in the manner and form agreed on, and it is bound by the account rendered, and it was the duty of the United States to have immediately paid the amount found due upon such accounting under the plain letter of the contract of December 19, 1891.

In a reply brief Government counsel enlarges on the account rendered by the United States not being an account stated and being merely the unauthorized account of two laymen based on erroneous assumptions of law, when they should merely have furnished the Cherokees a clean copy of old accounts without review (which the Cherokees already had, East. 22, Treaty, 1866).

We respectfully reply that the account rendered was not the account of two laymen, but of the United States, made under authority of Congress in the manner and form directed by the United States; that the account of moneys due could have been rendered in no other way by the agencies of the Government; that they were obliged to construe the treaties in order to "properly

render" it as directed by statute (Rec., 107, sec. 3); that they had the legal advice of the law departments of both the Indian Office and of the Interior Department, which is fully equipped with its own attorney-general and his corps of competent assistants.

When they settled on a legal construction of the treaties, as they did, it was no "assumption," but a construction duly authorized and made under competent legal advice.

When the Secretary of the Interior acted in transmitting this account to the Cherokees he did so under competent legal advice, and his act was the act of the United States.

The cases of State *vs.* Brown and Nutt *vs.* U. S., cited (Ibid., 5), are obviously entirely different and without force in this case.

Government counsel denies that the per capita of the Cherokees is a trust fund. He is perfectly answered by article 5 of the Cherokee treaty of 1846, which describes the per capita as a trust fund.

The $1,047,067 appropriated June 12, 1838, for removal and *to aid in* subsistence had the express proviso that no part of such fund so appropriated for removal should be charged to the $5,000,000 fund. In point of fact, it was left untouched in the Treasury until 1839, until the removal was completed. The money for removal, in express disregard of the statute, was taken from the $5,000,000.

Government counsel callously explains (p. 11) that it was "a matter of indifference." If the moneys appropriated for removal, $1,647,067, had been used as directed it would have left the $5,000,000 intact and the Eastern Cherokees would, in 1852, have received the fund now in suit and it is most emphatically not "a matter of indifference."

On page 13 reply brief Government counsel says that

at this eleventh hour Eastern Cherokees allege that the fund in controversy had been paid to Capt. John Page, an "agent of the Government," and should be reimbursed under art. 3, treaty 1846, which had agreed "to reimburse all the other sums paid to any agent of the Government and improperly charged to said fund" [$5,000,000 fund]. That this proposition, if true, "i s the end of the controversy in this case." For proof of its truth see H. R. Rept., 1098, 27 Cong., 2d Sess., p. 69, and Treasury Disbursements, 1838, Rec., 90. We agree that this disposes of Government's defense and made this contention in the Court of Claims; but Government counsel sagely remarks that this refers only to special sums paid to agents for private salaries and personal expenses.

That it does not really mean what it says so strongly, "to reimburse all the other sums paid to any agent," but only the little sums paid for personal services.

That it does not refer to the sums paid out of that fund in large amounts to agents on their bonds and by them erroneously disbursed or embezzled (and there were important sums so embezzled and refunded), but only refers to the private salaries of the agents of the United States.

The language means what it plainly says, and can not be set aside, and completely disposes of the Government's defense.

The United States ought to have paid this money in 1838 and did not. It ought to have paid it in 1852 and did not. It ought to have paid it in 1895 and did not.

One of the frailties of Government is that Government agencies are, at last, but human, with the weaknesses of human nature. Many of the accounting officers and officials of the Government believe they serve the Government when by art, or craft, or by force they protect the Treasury from every claim, good or bad, sound or unsound, just or unjust. Such officials feel it to be a virtue

to construe the treaties against the Indian, unmindful of the true meaning or the better and more righteous interpretation.

It is this spirit which deprived the helpless Cherokees of the per capita promised them as the purchase price of their lands east of the Mississippi River.

Against this erroneous conception of duty, there has been found no adequate remedy, except in the courts of the United States. Congress has therefore referred the case of the Cherokees to this Honorable Court, where at last justice may be done.

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FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court U.S.
FILED
JAN 23 1906
JAMES H. McKENNEY,
Clerk

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vs.
THE CHEROKEE NATION.
No. 346.

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The Cherokee Nation, as a body politic, a government, is in the singular position of repudiating the last official act of the Cherokee Nation as a government in regard to the fund in controversy, to wit: The act of the Cherokee

National Council of December 7, 1900 (Rec., 40), which declared this fund due exclusively to the Eastern Cherokees.

This government was abolished in 1898. It has no judicial department, no legislative department, no laws capable of execution, no executive department except a nominal chief, with absolutely no authority, but declares itself in this suit the "rightful claimant" under the jurisdictional act, and claims, in the face of its own pleadings to the contrary (R., 1, 40, 115), to be a trustee or agency through which a decree must pass to the equitable owners.

It sues as a government when the jurisdictional act authorizes a suit only of the *tribe* or band thereof. The jurisdictional act does not authorize the suit of the Cherokee government or "any band thereof," and obviously a government can not be divided into bands (R., 77).

The bands referred to and which have heretofore appeared in court are the Western Cherokees, the Eastern Cherokees, the Delawares, the Shawnees, the Freedmen, and the adopted whites.

None of these bands have sued in this case except the Eastern Cherokees, and none of the bands make any claims for the per capita fund in controversy except the Eastern Cherokees.

The "Cherokee Nation" claims the fund on the theory that the "Cherokee Nation" as a government was the principal to the contract of December 19, 1891. The "body politic" asserts that *it* "furnished the consideration" in the lands of the outlet. That it was in payment of these lands the United States agreed to render the account and pay the amount found due to the National Council of the Cherokee Nation, that is, to the government under the title "Cherokee Nation."

The Eastern Cherokees reply:

That the "Cherokee Nation" **as a government** did

not own the outlet. The outlet was the property of the Cherokee Tribe, "of the whole Cherokee people," under article 1, treaty of 1846 (R., 93, par. 4);

That there is no Cherokee Council in existence now to whom this fund could be paid, as proposed in the agreement of 1891;

That the "Cherokee Nation" as a government making the agreement of 1891 was only a representative of the Cherokees as a tribe of people, and that this representative was not even allowed by Congress in ratifying the agreement of 1891 by the act of March 3, 1893, to receive any of the cash consideration agreed to be paid for the outlet that belonged to any protesting band of the tribe.

The Congress of the United States retained nearly $2,000,000 of the cash consideration agreed to be paid by act of March 3, 1893, and refused to pay it to the Cherokee National Council or to the Cherokee government, and the United States, under the decisions of this honorable court in the Delaware and Shawnee cases against the Cherokee Nation, and the decision of the Court of Claims in the Freedmen case, refused to pay such funds, due to these bands, over to the Cherokee Nation as a government. This act of Congress repealed pro tanto this agreement to pay the "Cherokee Nation" as a body politic, and illustrates the true meaning of the agreement, which is that these payments were to be made to Cherokees as their rights equitably appeared, and not to a corrupt and untrustworthy government.

On June 28, 1898, Congress repealed the remainder of the proposition, that money might be paid to this so-called body politic, by section 19 of the Curtis Act, which expressly declared that in the future no moneys should be paid by the United States to any of the tribal governments in Indian Territory. Indeed, this act of Congress abolished the tribal governments then and

there, except in name, on the ground, as set forth by this honorable court in Stevens *vs.* Cherokee Nation, 174 U. S., 445, that these governments were reported by the United States Commission to the Five Civilized Tribes, of which Hon. Henry L. Dawes was chairman, that these "so-called governments" "in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

It is obvious the suit of the Cherokee government appearing under the title "Cherokee Nation" should have been brought by the title "Cherokee Tribe" as instructed by the jurisdictional act (R., 77). The tribe furnished the outlet, and the tribe was the principal in that contract of December 19, 1891, while the Cherokee government designated "Cherokee Nation" was merely an agency through which the tribe acted.

The agent is dead. The tribe survived.

The agency had no estate. The tribe had an estate.

The agency was destroyed by act of Congress June 28, 1898. The tribe annulled the tribal compact as of September 1, 1902, by the vote of the Cherokee people of August 7, 1902, under authority of the act of Congress of July 1, 1902 (Cherokee Allotment Act). (See brief, Cherokee Nation, p. 6, secs. 26, 27, 28, 29, 31.) The estate of the tribe was by this act distributed, and the tribe as a tribe ceased to exist September 1, 1902. Of course, as a decedent, it had an estate and was permitted to bring suit on any claim "the Cherokee Tribe" had, as set forth in section 68 (Ibid., page 8). It was the Cherokee Tribe, and not the Cherokee government, which was authorized to bring suit. If Congress had intended that the Cherokee government might bring suit it would have described the body politic in terms unmistakable, as it

did do in the section immediately preceding section 68, to wit:

> "Sec. 63. The tribal government of the Cherokee Nation shall not continue longer than March 4, 1906."

There is no doubt what this means, but the defunct government, under the ambiguous title, "Cherokee Nation," has appeared as claimant in three different capacities in one and the same suit, to wit: First, as a government and body politic (R., 1); second, as trustee for the tribe (Brief, 100); third, as a possible trustee for the Eastern Cherokees, who were members of the tribe, and of other Eastern Cherokees who are not members of the tribe (Brief, 109, sec. 4).

The Cherokee government brought its suit as a "body politic" (R., 1).

The Cherokee government denied the last official declaration of its National Council and principal chief, that this fund in controversy was exclusively the fund of the Eastern Cherokees, and denied that it had any trust relation whatever to the Eastern Cherokees (R., 40).

This so-called government appealed against the decision of the Court of Claims directing the fund to be paid the Eastern and Western Cherokees (R., 115), on the ground that the body politic as a government was entitled as a matter of common law, but that the fund when distributed would go to the Delawares, Shawnees and Freedmen, as well as to the Cherokees, but that no part of it should go to the Eastern Cherokees, who were not members of the Cherokee Tribe in Indian Territory (Brief, p. 109).

The Cherokee government insists that it is entitled because this is merely a suit at common law (Brief, 100, etc.).

If ever there was a suit in equity, this is a suit in equity. The right of the Cherokee Nation to recover is based on equity in the accounting rendered by the United States and in the treaties construed under the rules of equity, and it pleads its right by equity (Brief, 90). The suit involves the interpleading of various groups of people and individuals claiming equitable rights. The case could not be decided on common law rules. It is undoubtedly a suit in equity. It involves over 30,000 per capita claimants. It involves the trusteeship of the United States in its relation to the whole tribe, to numerous bands thereof, as well as to the individuals entitled to per capita.

The sums sued for are four in number. To three of these funds the Cherokee Tribe is the "rightful claimant." To one of these funds the Eastern Cherokees, whether west of the Mississippi or east of the Mississippi, are the "rightful claimants" under the express direction of article 9 of the treaty of 1846 (R., 96, 109), and the act of the Cherokee National Council of December 7, 1900, concedes this (R., 40).

The jurisdictional act directed the Court of Claims to render judgment to the "rightful claimant" (R., 78). There are two "rightful claimants," therefore, and both of the "rightful claimants" are composite bodies. It was necessary in the jurisdictional act, on this very contingency, to direct the court in its decree to determine to whom the judgment so rendered equitably belongs. Who are the equitable owners of the fund due the tribe? We respectfully submit the members of the tribe as fixed by the rolls of September 1, 1902, under the Cherokee Allotment Act, are the equitable owners of the three funds due the tribe.

Who are the equitable owners of the fund due the Eastern Cherokees? We respectfully submit, the people designated by the 9th article of the treaty of 1846, and

their legal representatives, as pointed out by that article.

The so-called Cherokee Nation, body politic, suing in this cause, has argued strenuously that the receipt of 1852 was binding on the Eastern Cherokees; that the Eastern Cherokees did not protest. It denies the competency of the National Council to protest for the Eastern Cherokees November 27, 1857. It would thus defeat the Eastern Cherokees, comprising almost the whole of the Cherokee citizenship of the Cherokee Tribe west in order to secure for this late body politic a common law judgment in the interest of a few adopted Shawnees and Freedmen who make no claim. This plea recalls the two women contending for the possession of the child before King Solomon, where the unjust claimant was willing to have the child cut in twain in order to get her share.

This so-called Cherokee Nation, claiming to be a body politic, although confessedly without a single function of government, is now claiming a fund which the nation has twice decided belongs to the Eastern Cherokees, once in the treaty of 1846 and again in its last will and testament of December 7, 1900.

It claims a fund which can never come into its hands and can never benefit this alleged body politic one dollar.

The so-called Cherokee Nation in this suit has contended that the Eastern Cherokees were under contract by the treaty of 1835 to move within two years and that when they did not move they abandoned their per capita right. The answer to this is, that article 12 of the treaty of 1835 declares in precise terms the exact contrary, that those who wished to remain might do so and not lose their per capita rights, but would lose, and did lose, their rights in the western lands and in the communal funds which went west with the tribe. This contention is further completely met by the tenth article of the treaty of 1846 (R., 96).

This alleged body politic contends that the body

politic bought this per capita due the Eastern Cherokees by the Cherokee agreement of December 19, 1891, in which the United States agreed to render an account and pay its old debts. The answer to this is, that the United States, in promising to pay its old debts, merely intended to pay them in accordance with the true meaning of the treaties.

That the United States had no purpose of selling the per capita due the Eastern Cherokees to the Delawares and Shawnees.

That the Eastern Cherokees, who controlled the Cherokee government, and who wrote this section for their own benefit, had no intention whatever of transferring the debt due them to the Shawnees and Freedmen.

This per capita was a vested personal individual right. It was a claim on the United States. The statutes of the United States expressly forbid the transfer of claims against the United States from one person to another, and, moreover, it being an individual claim, and the Eastern Cherokees having no organization, could not even appear to convey. Beside these insuperable difficulties of transferring this per capita, the individuals to whom it was due embraced thousands of minors, married women, and incompetents and individuals scattered over the States of the Union, containing many thousands of people who were not in any way connected with the Cherokee Nation as a body politic. What consideration passed from the Shawnees to the Eastern Cherokees to pay for this transfer of title to the Eastern Cherokee per capita?

The theory of the so-called Cherokee Nation, that Congress intended to exercise its sovereign authority, and did exercise it, in transferring the per capita due the Eastern Cherokees of North Carolina and other States, to the Shawnees and Freedmen, is absurd. Congress did nothing of the kind.

The final theory of this claimant is, that Congress, although having the sovereign power to transfer the per capita due the North Carolina Cherokees, who earnestly claim it, to the Shawnees and Freedmen, who don't claim it, had no legal authority to give the Court of Claims equitable jurisdiction to hear the North Carolina Cherokees, and that this honorable court "would have no legal authority to destroy the right and the title" "which the whole Nation purchased" (Brief, 117, 105), would seem to answer itself. Congress has full power to pass the jurisdictional act, and this honorable court would destroy no title of the body politic in the per capita, because it has none. It is true that the agreement of 1891 was made with the "Cherokee Nation" as a government; that in this agreement the United States agreed to pay the Cherokee government as an agency of the people over $8,000,000 in cash, and to render an account of moneys due under the old treaties and pay the amount found due to the National Council; nevertheless, on March 3, 1893, Congress in ratifying the Cherokee agreement refused to pay the cash consideration agreed on to this "Cherokee Nation" as an agent of the Cherokees, because it had already been found untrustworthy. Congress retained nearly $2,000,000 of this fund in the treasury, which was subsequently paid out to the bands of the tribe who were entitled to it, disregarding and repealing the agreement to pay these funds to the Cherokee government, because the government had been shown to be untrustworthy.

On June, 1898, Congress entirely repealed the act of March 3, 1893, which had promised payment of these funds to the Cherokee government, by section 19 of the Curtis Act, which declared that no moneys, on any account whatever, should thereafter be paid to such Cherokee government, and yet this defunct government, without either legislative, executive, or judicial functions,

comes into court and demands this fund as against the equitable owners. for itself or as agent or as trustee, as the court may permit.

It caps the climax when in its brief (109), after having vigorously opposed the Eastern Cherokees for three years, and having denied any relation of trust, it finally says:

> "A judgment in favor of the Cherokee Nation must, therefore, affirm a right in each and every member of the Nation, in the proceeds of that judgment, unless it be held further, that in making the agreement of 1891–3, the Nation was a mere trustee for particular members, or, indeed, among others, for some Cherokees who have long ceased to be members."

The So-Called "Cherokee Nation" as Trustee.

This is the same alleged "Cherokee Nation" which vigorously denied its trust relation to the Eastern Cherokees (R., 40); which appealed from a judgment in its favor as trustee of the Eastern and Western Cherokees (R., 115), and denounces the right of the Eastern Cherokees to recover, but now meekly suggests that, after all, a judgment in its favor would affirm a right in over 30,000 Eastern Cherokees, and also to the Western Cherokees, and even to the Eastern Cherokees of North Carolina.

This so-called body politic has no capacity to represent anybody as trustee or agent, not even itself. It appears in this court upon the sole authority of one Cherokee citizen, to wit, Mr. Thomas M. Buffington, principal chief, without any pretense of authority from the Cherokee National Council. Mr. Buffington acted for the tribe, with the approval of the Government, and brought this action to present the claims of the Cherokee Tribe under section 68 (act July 1, 1902), as shown by the authority filed in this cause (R., 5, 38, 39).

The Court of Claims was obliged to make the United States trustee for the three items due the Cherokee Tribe (R., 112, 113). The United States has always been the trustee of the Eastern Cherokees for the per capita promised them and appropriated for their benefit, July 2, 1836 (5 Stats., 73).

The "Cherokee Nation" "as a tribe" has no capacity to act as trustee. The United States is trustee for the tribe. The effect of making the "Cherokee Tribe" nominal trustee for the Eastern Cherokees, thousands of whom are not members of such tribe, and then directing the United States to act as trustee for the Cherokee Tribe, nominal trustee for such Eastern Cherokees, to execute the trust, is merely to deprive the Eastern Cherokees of a part of their per capita, contracted by Mr. Buffington to counsel as compensation for opposing the Eastern Cherokees, and attempting to defeat them.

A court of equity will not charge a trust fund with the expense incurred by the trustee in an attempt by him to defeat the establishment of the trust and to seize the fund for himself.

On the 28th of June, 1898, Congress deprived this body politic of all future capacity to receive, as trustee, one dollar, on any account whatever, for any of its members—Delawares, Shawnees, Freedmen, Western Cherokees, and Eastern Cherokees. Congress, by the act of July 1, 1902, confirmed this action by the further provision that the funds and lands of the tribe should be distributed by the United States to the members of the tribe, the United States acting as trustee, as to all lands and moneys, for all members of the tribe, and that this alleged government should have no future function as trustee in any capacity. Thereupon the whole Cherokee people gave this act their sanction and placed the great seal of their approval upon these decrees by their vote of August 7, 1902.

Thereupon this so-called government comes into court and pleads that, after all, it would be well to recognize it as trustee, as a common law right, and as an equitable claimant at the same time, because—

> "the Slade and Bender account need not, and, we suggest, does not, rest upon the letter of the treaties of 1835 and 1846. It builds upon equity, promises equity, with due regard to the principles of broad justice and sound policy," etc. (Brief, 90).

The trial court, in effect, gave them a common law judgment, and decreed the Eastern and Western Cherokees the equitable owners.

The Cherokee Tribe can not recover judgment for itself as the "rightful claimant," because—

First, it is not the "rightful claimant," but by act of December 7, 1900, it conceded that the fund belonged to the Eastern Cherokees.

Second, the "Cherokee Tribe," of Indian Territory, as now constituted, did not own the land in Georgia, of which this fund is the proceeds.

Third, the treaties of 1835–6 and 1846 pledged this fund expressly to the Eastern Cherokees and not to the present Cherokee Tribe, of Indian Territory.

Fourth, the Eastern Cherokees, with full capacity to sue in this equity cause, are the "rightful claimants" as against the Cherokee Tribe, because they are the owners of the fund.

The Cherokee Tribe can not recover as trustee, because—

First, it did not sue as trustee.

Second, it has expressly denied the trust.

Third, it has attempted to defeat the cestui que trust, and claimed the fund for itself.

Fourth, it is not authorized to sue as trustee, but only for itself.

Each band was likewise authorized to sue for itself.

Fifth, the tribe has not capacity as trustee to receive

funds due its own members, but the United States, under the act of June 28, 1898, section 19, and the act of July 1, 1902 (The Cherokee Allotment Act), is trustee for all members of the Cherokee Tribe, and the trial court directed the three items due the tribe to be paid to the United States as trustee for the tribe.

Seventh, the tribe, as a tribe, by its own vote, terminated, as of the date fixed by itself, September 1, 1902.

Eighth, the tribe never had any relation of trust or privity with thousands of Eastern Cherokees who are not members of the tribe.

Ninth, the United States, by Act of July 2, 1836 (5 Stats., 73), became trustee for this per capita fund, and is now trustee and always has been trustee of every individual entitled to the per capita in question. The United States has not been discharged as trustee, and its obligation as such will not terminate until it has paid its cestui que trust the per capita promised.

Tenth, the Congress of the United States, in the jurisdictional act of March 3, 1903, authorized the Eastern Cherokees of Indian Territory and the Eastern Cherokees east of the Mississippi River to bring a suit in equity against the United States (their trustee) and against the Cherokee Nation, an adverse claimant to the fund, as explained by Attorney-General Knox in the reference in the jurisdictional act contained.

It follows that if the Eastern Cherokees are "rightful claimants" against the Cherokee Tribe, which has in this suit strongly denied the right of the Eastern Cherokees to recover, then the Eastern Cherokees are entitled to a direct judgment without any deduction on account of any contract of their adverse claimant, the Cherokee Tribe. The Eastern Cherokees can not be equitably charged with the expense incurred in the name of the tribe in an effort to defeat the establishment of their rights.

The jurisdictional act of March 3, 1903, gave the trial

court jurisdiction of the very claim in question, involving in the completest manner, principal and interest, and setting forth the entire history found in the references in the jurisdictional act contained. Congress, having on April 28, 1902, received the findings of fact of the Court of Claims, upon the said claim, and having been advised by the Attorney-General in his report of January 22, 1903, referred to in the jurisdictional act, that there were two claimants and that provision should be made for the determination of the "rightful claimant," passed the jurisdictional act authorizing a suit in equity to be brought by the Eastern Cherokees against the United States [their trustee], and against the Cherokee Nation, which claimed the same fund adversely to the Eastern Cherokees.

Under these jurisdictional acts, if there was a claim of the tribe the Cherokee Tribe should prosecute. If there were claims of the bands of the tribes, the bands and not the tribe should prosecute them. No band could prosecute a tribal claim, and obviously the tribe could not prosecute a claim which belonged solely to one of the bands of the tribe. The tribe was empowered to proceed for itself, and similar power was conferred upon each band of the tribe. If, therefore, the court should determine that the fund now in question equitably belongs to the Eastern Cherokees it must regard the jurisdictional act and give its judgment to them.

The Eastern Cherokees, therefore, respectfully submit that this honorable court now direct a decree to be entered by the Court of Claims in favor of the Eastern Cherokees, as the "rightful claimant" to the fund in question, to wit: In the sum of $1,111,284.70, with interest at the rate of 5 per centum per annum from January 12, 1838, until paid, less such counsel fees and expenses as may be allowed by that court under the provisions of the act of March 3, 1903, and that such decree shall further declare that the equitable owners of the

fund so adjudged due to the "Eastern Cherokees" are the persons as described by article 9 of the treaty of 1846, to wit: "All those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty, and the supplement thereto," and that such fund shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following.

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof, and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern Cherokees, as described by article 9 of the treaty of 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

It is respectfully submitted such judgment will fully satisfy the obligations of the United States under article 15 of the treaty of 1835–36, under article 9 of the treaty of 1846, and under the accounting rendered by the United States on May 21, 1894. Such judgment will also satisfy the people of the Indian Territory, because the Eastern Cherokees alone in the Indian Territory claim the fund, and it will satisfy the Eastern Cherokees east of the Mississippi River.

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Supplemental Brief for Eastern Cherokees.

Government counsel in a supplemental brief insists that Slade & Bender rendered the account under the Cherokee agreement in effect as the agents of the Cherokees and should have merely given the Cherokees a plain

copy of the accounts as they already stood, without correction.

It was the United States who rendered the account, and no one else. It was not the stenographer who rendered the account; it was not the experts; it was not the legal department of the Indian Office; it was not the Commissioner of Indian affairs; it was not the Indian division of the Interior Department; it was not the Assistant Attorney-General of the Interior Department or his legal department, and it was not the Secretary of the Interior, although all of these were agencies in rendering the account. It was the United States that rendered the account.

It was not to be a copy. The Cherokees already had a copy under article 22, treaty of 1866.

In the Cherokee agreement of 1891, it was provided:

> "If it shall be found upon such accounting that any sum of money has been so" [improperly, unjustly, illegally] "withheld, the amount shall be duly appropriated by Congress."

The agreement contemplated the contingency of the account finding this money claimed, to be due as claimed, and the immediate payment thereof, if found due, and therefore the accounting was not to be a copy of errors already well known.

The Jurisdictional Act of 1902.

Government counsel asserts that the jurisdictional act makes no reference whatever to the account rendered in 1894. This remark is obviously an oversight of Government counsel, because the jurisdictional act expressly refers this very claim to the court, including its demand for principal and interest and including the allowance of principal and interest by the accounting rendered. The

jurisdictional act refers to the claim (R., 78) by reference to H. R., Ex Doc. 309, Fifty-seventh Congress, second session, which is the report of Attorney-General Knox on the claims presented to him by the Eastern Cherokees and the Cherokee Nation under the accounting rendered by the United States in 1894, as set forth in H. R., Ex Doc. 182, Fifty-third Congress, third session, and the findings of fact of the Court of Claims of April 28, 1902, with regard to such accounting, and the letter of the Department of Justice of December 29, 1895, in regard to such accounting (R., 78, the last paragraph).

The Western Cherokees.

The Eastern Cherokees agree with the Assistant Attorney-General that the Western Cherokees have no standing whatever in this action, having already had their full day in court, and having been allowed all that they claim under the treaties referred to (R., 102, 148 U. S., 427). The fourth article of the treaty of 1846 provided full payment to the Western Cherokees for their communal interest in their lands east of the Mississippi. They were paid a sum equal to one-third of what the Supreme Court found to be a just settlement under the marshaling of accounts proposed by article 4, treaty 1846. They were not promised one-third of the fund due under the ninth article, all of which by that article was due the Eastern Cherokees, but they were promised a sum *equal to* the one-third of residuum found by a statement of the account upon another marshaling of the accounts as provided in article 4.

The Western Cherokees were paid in 1894 every dollar of the per capita due them for their communal interest in the lands east of the Mississippi River and make no claim whatever to the per capita fund now claimed by the Eastern Cherokees.

Receipts of 1852 Excepted no Per Capita.

Government counsel insists that when the act of Congress provided for the exception in the receipts of 1852 of "such money and lands, if any, as the United States may hold in trust for said Cherokees," the reference was to the $500,000 general funds bearing interest and nothing else. Why the language, "if any," if it referred to trust funds which were certain? It referred to funds held in trust which were uncertain. Article 5 of the treaty of 1846 expressly describes the per capita due the Western Cherokees as held "in trust" for them. It needs no such description to demonstrate that any fund appropriated to an Indian tribe and held by the United States is held "in trust" for them. Therefore the receipt of 1852 did not include the per capita held "in trust" for the Eastern Cherokees, "if any" was indeed so held. This point is not important, because the agreement of 1891, the jurisdictional act of 1902, and the jurisdictional act as amended in 1903, reopened the whole case in three different instances, any one of which is sufficient.

Eastern Cherokees of 1835 Had No More Dealings With the United States.

Government counsel misunderstood the assertion of counsel for the Eastern Cherokees in stating that the Eastern Cherokees, after the treaty of 1835, had no more dealings with the United States. What was actually said was that the Eastern Cherokees who remained in North Carolina and the States east of the Mississippi River, who were promised the per capita by the treaty of 1835, had no further dealings with the United States. This refers to those Indians who remained east of the Mississippi River and who were not in Indian Territory when the treaty of 1846 was made. There were over 2,000 of these Indians in 1852 unorganized, still living in North Carolina, Georgia, Tennessee, and Alabama, without or-

ganization and without having had any dealings with the United States subsequent to the treaty of 1835–36, and no argument can be heard that they, by subsequent treaty, released the United States, because they were parties to no subsequent treaty.

Interest.

Government counsel sees no point in the fact, which he concedes, that the Indians claimed interest during the negotiations of the contract of December 19, 1891. The fact that they claimed interest (as they had a right to do under article 11, treaty of 1846, and the Senate's decision as umpire) (R., 96), in the course of the negotiation and that it was allowed in the manner and form agreed on, binds the United States absolutely under the decision of the Supreme Court in the Western Cherokee case, as a principle of law (148 U. S., 478).

Even if interest had not been allowed in the accounting rendered by the United States in 1894, and there had been no such account, and there had been no agreement of December 19, 1891, still the United States would owe the interest on this fund under the decision of the Supreme Court in the Western Cherokee case, which is absolutely identical with this.

In the Western Cherokee case the court found that the

> "demand of interest formed the subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that the determination was arrived at as prescribed; was accepted as valid and binding by the United States, and was carried into effect by the payment of"

principal and interest then found due. This is precisely the case of the Eastern Cherokees, because in their case, as in the case of the Western Cherokees,

> "the demand of interest formed a subject of difference while the negotiations were being carried

> on, the determination of which was provided for in the treaty itself; that the determination was arrived at as prescribed; was accepted as valid and binding by the United States, and was carried into effect by the payment of "

the principal and interest found due.

Article 11 of the treaty of 1846, and the resolution of the Senate, as umpire on the question of interest, covered the claim of the Eastern and Western Cherokees, and was acted on by the same resolution (R., 96).

Government counsel declares that this was not an interest-bearing fund, and, therefore, Mrs. Lockwood's argument in behalf of interest does not prove that the Eastern Cherokees are entitled to interest. The Eastern Cherokees do not rest upon any such argument, although under the act of Congress (5 Stats., 465) all funds held in trust by the United States are directed to be invested in stocks, bearing a rate of interest not less than 5 per centum per annum, and it has been the unbroken practice of the Government to allow funds held in trust for Indians to bear that rate of interest. The demand of interest, with the reasons therefor, are set up with precision in the record, pages 32 to 34, and in brief of Eastern Cherokees, pages 95 to 98, wherein Government counsel is most fully answered.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

U. S. Supreme Court
FILED
DEC 18 1905
JAMES H. McKENNEY, Clerk

No. 346.

THE UNITED STATES, APPELLANTS,

vs.

THE CHEROKEE NATION.

No. 347.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE UNITED STATES AND THE CHEROKEE NATION.

No. 348.

THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

Petition on Behalf of the Eastern Cherokees for an Extension of the Time for Argument and for Direction as to the Order in which the Attorneys Shall Appear.

OWEN & BELT,
WILLIAM H. ROBESON,
Attorneys of Record.

JAMES K. JONES,
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SUPREME COURT OF THE UNITED STATES.

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THE UNITED STATES.

Petition on Behalf of the Eastern Cherokees for an Extension of the Time for Argument and for Direction as to the Order in which the Attorneys Shall Appear.

To the honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the Eastern Cherokees, by their attorneys, and move the court that the usual time for argument provided

by the rules be extended so that the attorneys for the Eastern Cherokees shall be given three hours for argument.

A similar petition is simultaneously presented on behalf of the Cherokee Nation.

If this were a suit between the United States and the Eastern Cherokees alone, counsel would, in view of the large amount involved and the many questions to be discussed arising out of the numerous treaties with the United States and the laws relating thereto, ask the court for a similar extension. But the Cherokee Nation is also a party to the litigation and there is an additional controversy between them and the Eastern Cherokees.

The judgment of the Court of Claims is for $1,111,284.70, with interest from June 12, 1838, so that the practical recovery in the case is about four and a half million dollars.

To properly present these treaties and seek their construction, and that of the laws enacted with reference thereto, would of itself require more time than is provided by the rules of the court.

The court is also asked to direct the order of argument. The Cherokee Nation in its petition ask the right both to open and to close the argument. This we most earnestly oppose.

In this consolidated case the Eastern Cherokees, the Cherokee Nation, and the United States are all appellants:

The United States because the judgment is against the Government;

The Cherokee Nation because the judgment is not rendered in its favor as a body politic;

The Eastern Cherokees because the decree was not awarded directly and exclusively to them as to the item which con-

stitutes the main body of the judgment, namely, $1,111,284.70 with interest.

The Eastern Cherokees are appellants in the fullest sense of the word, and are compelled to carry the burden of proof as against both the United States and the Cherokee Nation, and believe themselves justly entitled to open and to close the argument.

The petitioners respectfully represent and show that the fund in question is the balance of the five-million-dollar fund which was the purchase price of the lands of the Eastern Cherokees under the treaty of 1835–'36 and appropriated to them July 2, 1836, and is due the Eastern Cherokees per capita exclusively. This fund is also due the Eastern Cherokees under the accounting rendered by the United States in pursuance of the agreement of December 19, 1891, between the Cherokee Nation and the United States, ratified by Congress March 3, 1893.

The Cherokee Nation as a body politic relies only upon this agreement as a contract.

The Eastern Cherokees assert that they are entitled under the same agreement, the Cherokee Nation in said agreement having merely acted in a representative capacity for them; but that if such agreement had never been made they would nevertheless be entitled under the treaties of 1835–'36 and 1846 and the laws relating thereto and executive action thereon. Whether the liability of the United States arose from and depends upon the agreement of 1891 or whether it arose out of and depends upon the treaty of 1835–'36 and the treaty of 1846 was a point upon which the court below differed, one judge dissenting from the views of the majority that the agreement of 1891 controlled, but concurring in

the judgment on the ground that the treaty was the source of the obligation.

Petitioners respectfully represent and show that they occupy no inferior position in the matter of these appeals; that they are seeking a fund which they claim to be their own, but which has been by the judgment of the lower court awarded to the Cherokee Nation and a distribution directed which is inequitable. It is respectfully represented and shown unto your honors that the attorneys for the Eastern Cherokees have twice secured the reference of this cause to the Court of Claims unassisted by the authorities of the Cherokee Nation; that the first reference was under the act of March 3, 1883, known as the Bowman act, and that favorable findings of fact were then secured by the efforts of the Eastern Cherokees which form the basis of the findings of fact made in the present case; that the act of July 1, 1902, referring the case to the Court of Claims, whereby it was authorized to award judgment and under which this appeal is now pending, was secured by the attorneys for the Eastern Cherokees; that the attorneys representing the Eastern Cherokees have represented them before committees of Congress or in the courts for a period of nearly six years.

The burden of this contest has been borne by the Eastern Cherokees, and the burden is now on them to make good their theory of the case as against the United States, as against the claim made on behalf of the Western Cherokees, and as against the Cherokee Nation, with the imperative necessity of reviewing the entire history of the case.

Petitioners, in view of the premises, believe they should have the opening and closing of the argument, but, being anxious to comply as far as possible with the desire of coun-

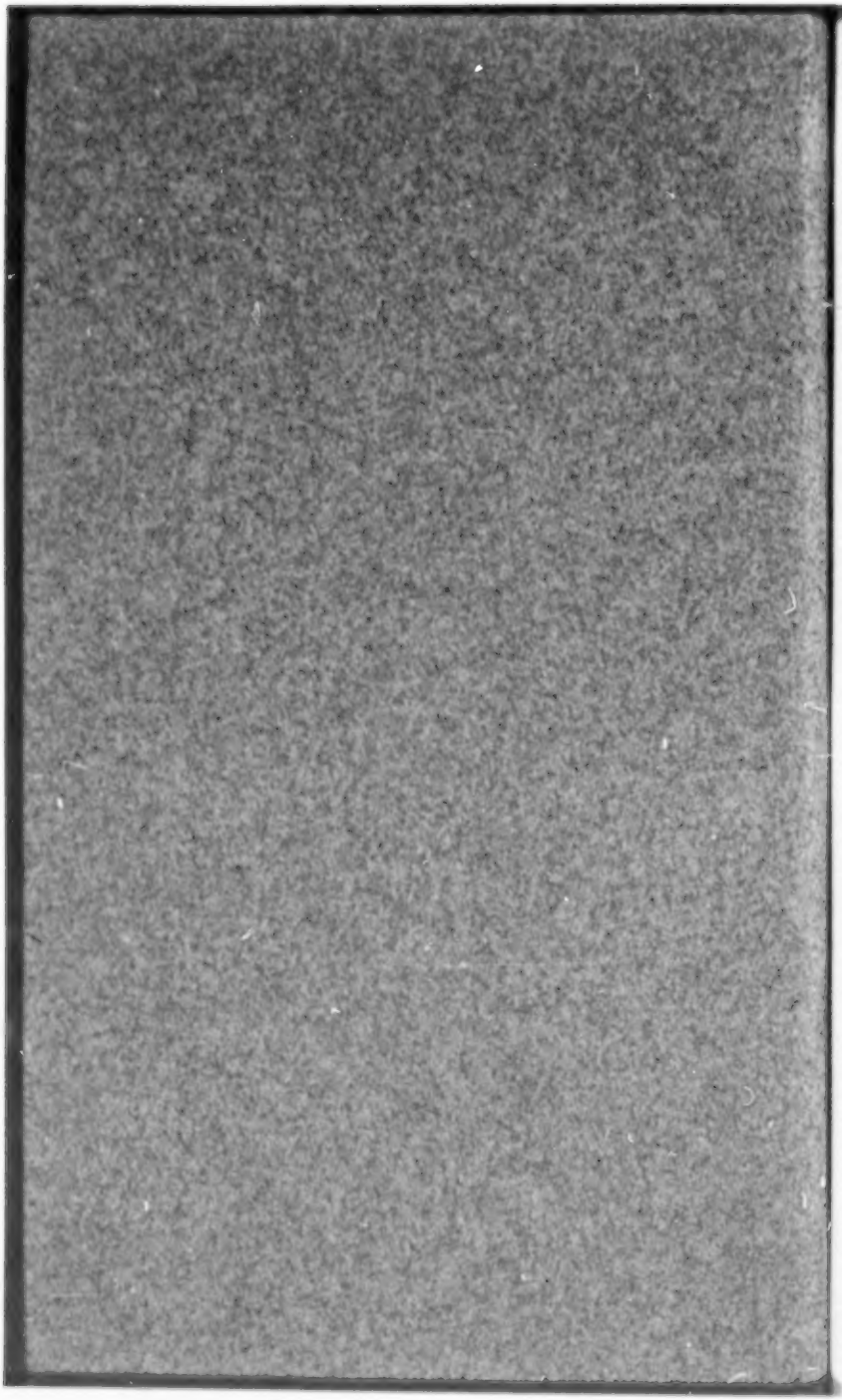
sel representing the United States and the Cherokee Nation, petitioners are willing to yield to the United States and the Cherokee Nation as to the opening argument; but petitioners earnestly insist that they shall be permitted to present the final argument.

Petitioners therefore respectfully pray that the order of argument be as follows:

The United States.
The Cherokee Nation.
The Eastern Cherokees.
The Cherokee Nation.
The United States.
The Eastern Cherokees.

OWEN & BELT,
WILLIAM H. ROBESON,
Attorneys of Record.

JAMES K. JONES,
Of Counsel.



56TH CONGRESS, 1st Session. SENATE. DOCUMENT No. 392.

346 m.

MEMORIAL OF THE EASTERN OR EMIGRANT CHEROKEES.

May 22, 1900.—Referred to the Committee on Indian Affairs and ordered to be printed.

Mr. MORGAN presented the following

MEMORIAL OF THE EASTERN OR EMIGRANT CHEROKEES, SO CALLED, PRAYING FOR THE PAYMENT TO THEM PER CAPITA OF THE TRUST FUND DUE UNDER THE NINTH ARTICLE OF THE TREATY OF 1846, AND APPROPRIATED TO THEM JULY 2, 1836, AND FOUND DUE BY THE AWARD OF THE EXECUTIVE DEPARTMENT OF THE UNITED STATES IN PURSUANCE OF THE CHEROKEE AGREEMENT OF DECEMBER 19, 1891, AND THE ACT OF CONGRESS OF MARCH 3, 1893. (27 STATS., 643.)

MAY 17, 1900.

To the honorable the Senate and House of Representatives in Congress assembled:

Your memorialists, the Eastern or Emigrant Cherokees of the Indian Territory, relying firmly on our vested rights under the accounting rendered by the executive department April 28, 1894, as set forth in Senate Docs. Nos. 215, 282, 305, 308, Fifty-sixth Congress, first session, and making our argument in such memorials a part hereof, and addressing this memorial particularly to the intent and true construction of the treaty of 1835 and the acts of Congress relative thereto, and the treaty of 1846 in settlement of the Cherokee difficulties, and particularly dealing with every adverse suggestion known to your petitioners, your memorialists respectfully submit the following statement:

SYNOPSIS OF ARGUMENT OF EASTERN OR EMIGRANT CHEROKEES.

I. Article 8, treaty 1828, obliges the United States to pay for removal and subsistence of all Cherokees from the east to the west.

II. This was the fixed policy of the United States with regard to all neighboring tribes; e. g., Creeks, Seminoles, Choctaws, Shawnees, etc.

III. The attempt to deduct the cost of removal and subistence from $5,000,000 fund offered by Senate for lands and possessions resulted in rejection of such proposed treaty October 23, 1835, even the leaders of the treaty party, Ridge and Boudinot, opposing.

IV. The treaty party, consisted of a few prominent Cherokees, who were paid over $30,000 for their services, in negotiating the treaty of 1835. They made treaty, however, on express condition that the question whether cost of removal was intended to be charged to the $5,000,000 fund should be left to the United States Senate.

V. By supplementary articles to treaty, the United States Senate decided it did not intend $5,000,000 fund should include cost of removal.

VI. Congress, July 2, 1836, appropriated $600,000 to cover cost of spoliations and removal, on an estimate that said sum was more than sufficient to pay removal and leave a surplus for the educational fund (Article 3, supplement).

VII. The War Department (after treaty of 1835) sustained the construction that under the treaty of 1828 subsistence was chargeable to the United States on November 18, 1836, in advising Cherokee Indian Agent B. F. Curry.

VIII. This construction was fully justified, because Article 8, treaty 1828, was not modified by the treaty 1835, as construed by the Senate and Congress, and because the purchase money could not be rightfully used to pay a subsisting obligation of the United States.

IX. The War Department, September 12, 1837, instructed Van Horne, the enrolling agent, to advise the Cherokees they would be moved and subsisted at the expense of the United States, and on the terms promised by Andrew Jackson's letter, 1835, which, among other things, promised them $150 per capita. The payment of the Slade-Bender award in addition to the previous per capita payment of 1852, excluding interest, would only make a total per capita payment of $124.78.

X. That "removal" was chargeable to the United States is further shown by the letter of the Secretary of War, written to John Ross and others, May 18, 1838, expressing the opinion that the United States ought to defray the expense of removal of the Cherokees.

XI. It is further shown by the letter of the Secretary of War to Gen. Winfield Scott sending him copy of the proposals made to Ross, and advising him to make arrangements with Ross so as to protect, not the Cherokees trust fund, but the interests of the United States, and avoid unnecessary and useless expenditure, but arrange for a comfortable removal.

XII. It is further shown by the estimate of the Secretary of War to Congress for a sum sufficient to pay the entire cost of the removal and subsistence of every Cherokee under date May 25, 1838.

XIII. It is further shown by the resolution of the House of Representatives asking for such estimate, on May 23, 1838.

XIV. It is further shown by the appropriation of June 12, 1838, made by Congress on such estimate, providing a sum sufficient, as Congress then believed, to pay the whole cost of the removal and subsistence of the entire Cherokee people, to wit, $1,047,017.

XV. It is further shown by the resolutions of the Cherokee Council of July 21, July 26, and of August 1, 1838, in which it is manifest that they understood that their self-emigration, through their own leaders, was based on a special understanding with the Secretary of War, as proposed to John Ross, and that it was to be paid for out of the appropriations made or to be made by the United States for that purpose.

XVI. It is certain they did not authorize any contract to be made for self-emigration under the treaty of 1835, but that they bitterly repudiated such treaty and its alleged trust fund, by innumerable protests and petitions extending from 1836 to 1846, and expressly at the very time and date under consideration when the Ross-Scott contract was made, to wit, July 21, 26, and August 1, 1838.

XVII. If they had been emigrating themselves under the treaty of 1835, by its terms they would have been restricted to $20 each for removal and $33.33⅓ each for subsistence.

XVIII. The United States, as trustee, can not exceed the sum prescribed by the treaty for removal and subsistence, or permit any extravagance to consume the trust fund due to the individual Cherokee per capita.

XIX. The theory that the Cherokees authorized the John Ross contract, and are responsible for any extravagance therein, and must pay therefor out of the trust fund in the hands of the United States is a manifest error.

(*a*) Because the Cherokee Nation under John Ross authorized no contract under such treaty. They repudiated the treaty of 1835, and the trust fund arising thereunder, at the time such contract was made, during its execution, at its completion, and for years after the matter was closed.

(*b*) More than that, they understood on July 21, July 26, and August 1, 1838, and November 11, 1840, as shown by their resolutions of these dates, that the cost of such removal would be paid out of the Treasury of the United States.

(*c*) It is further shown by their demanding indemnity for the country pretended to have been ceded in 1835 in their numerous petitions, an indemnity which was promised in 1841 by President Tyler after the settlement of the amount due Ross under his contract, and insisting on indemnity until the treaty of 1846 was made.

XX. It is said the contract with Ross was extravagant, and that the removal could have been made for less money under contract. If the contract was extravagant it would not relieve the United States from paying the sum promised nor justify charging extravagance to cestui qui trust. But it was not extravagant from a government standpoint. It would have cost the United States twice as much as the John Ross contract to have delivered these people in Indian Territory by military force. They were intensely excited. The four adjacent States apprehensive of a great Indian war. The Ross contract gave peace to four States, and caused the immediate dismissal of a large army, with its vast expense. General Scott explains a desolating drought immensely increased the expense of the Ross contract, and on his testimony it was paid. Over 600 burials helped to delay the thirteen Ross detachments. Any complaints against the justice of this contract must be silenced by the act of President Tyler in ordering it paid.

XXI. Commissioner Medill asserts the $600,000 and $1,047,000 was an increase in the purchase money of the Cherokee lands and a compromise with the Cherokees. This is a gross, if not willful, error, contradicted by the history above recited and supported by no good reason.

(*a*) Commissioner Medill offers the correspondence preceding the proposed treaty of October 23, 1835, wherein it was proposed to deduct the cost of removal from the price of the lands to justify his position. This is completely disposed of by the fact that such proposed treaty was rejected even by Ridge & Boudinot, on this very account, among others.

(*b*) Commissioner Medill quotes Senator White's report to support his position. Senator White calls the appropriation of June 12, 1838, a voluntary grant, and says the amount paid the Cherokees was liberal under the treaty of 1835, *as the difference in value between the countries exchanged by that treaty.* The answer to this is that Senator White was not passing on the points involved, and had no intention to express an opinion as to the construction of the treaty of 1828 or 1835, but gave a bad reason for a good action, in supporting the estimate of the Secretary of War. He over estimated what the Eastern Cherokees

received under that treaty by 14,000,000 acres of land, as there was no exchange of land by the treaty of 1835. His report concedes that he was not informed on the treaty of 1835 in various particulars, e. g., the $600,000 fund, the commutation of annuity, etc.

(*c*) Commissioner Medill fails to quote the very important report of the Committee on Indian Affairs of February 19, 1847, which had this exact point under consideration, and which found in favor of the Cherokees. (Jarnigan.)

(*d*) Commissioner Medill fails to quote the report made by the special commission—Adjutant General Jones, Colonel Mason, and Governor Butler—to examine into the complaints of the Cherokees, and who found in favor of Cherokees January 15, 1845, on very points at issue in elaborate report.

(*e*) Commissioner Medill fails also to quote the numerous reasons hereinabove set forth, which would have forced him to a different conclusion had he considered them.

(*f*) His report shows numerous errors, as shown in detail hereinafter, the juggling of the accounts, etc. Yet on this report the Auditor and Comptroller, taking him as their declared authority, made the error of charging trust fund with removal.

(*g*) Congress corrected a part of this (Commissioner Medill's) error on September 30, 1850, as to subsistence; a part on February 27, 1851, as to sums paid Government agents, and the Interior Department corrects the last error, as to "removal," in the Slade-Bender report of April 28, 1894, the refunding of which to the trust fund, with interest, is now demanded.

(*h*) Commissioner Medill quotes General Scott and draws the inference that General Scott had advised Cherokees that the United States would use trust fund after exhaustion of appropriation for removal. General Scott in letters of August 1 and 2 refers only to appropriations for removal, and only spoke to Ross of trust fund November 15, 1835, one hundred and seven days subsequent to the contract of August 1, 1838.

ARGUMENT.

It is impossible to comprehend the treaty of 1835 in its relations to the Indians and to the United States except in the light of its history.

On December 29, 1835, the Cherokee Nation owned the following land, which was ceded by that treaty to wit:

	Acres.
In Tennessee	949,760
In Georgia	4,609,280
In Alabama	1,611,520
In North Carolina	711,680
A total of acres	7,882,240

(Page 378, History of the Cherokee Indians, Bureau of Ethnology.)

On this land the Cherokees had over $2,000,000 in improved farms, houses, orchards, mills, etc., which with the land they thought worth $20,000,000 (p. 96, Senate Doc. No. 120, Twenty-fifth Congress, second session). The Cherokees estimated the land at 10,000,000 of acres; it was splendidly watered, fine climate, had great forests of valuable timber, inexhaustible quarries of marble; but above all, at that time there was much excitement over the gold mines in the Cherokee country. They say in their memorial (p. 40):

> The riches of the gold mines are incalculable. Some of the lots of 40 acres of land, embracing gold mines which have been surveyed and disposed of by lottery under the authority of Georgia (with the incumbrance of the Indian title), have been sold for upward of $30,000, etc. (House Doc. No. 286, Twenty-fourth Congress, first session, vol. 7, p. 13.)

The right of the Cherokees was established over the violent laws of Georgia, which provided for distributing the Cherokee lands among the citizens of Georgia, depriving the Cherokees of every civil right, etc., by the Supreme Court of the United States in Worcester *v.* Georgia. This decision declared the legislation of Georgia unconstitutional and void and the Cherokee treaties in full force.

Georgia refused to submit to the decision of the Supreme Court on the ground that she was a sovereign independent State.

PRESIDENT JACKSON'S DILEMMA.

President Jackson was in a serious dilemma—either to coerce Georgia to respect the Federal treaty with the Cherokees, break faith with the Cherokees, or make a new treaty with them.

J. F. Schermerhorn and Governor William Carroll were authorized to negotiate a new treaty March, 1835, after various propositions had failed. General Carroll being sick, Mr. Schermerhorn assumed the responsibilities of the negotiations alone. He was limited by a resolution of the United States Senate of March 6, 1835, to an offer of $5,000,000 for their lands and possessions. This the Cherokees were not willing to accept. Meeting with no substantial encouragement, he suggested, in a communication to the Secretary of War on September 10, 1835, two alternative propositions, by either of which a treaty might be secured.

These propositions were (1) that the appraising agents of the Government should ascertain from influential Cherokees their own opinion of the value of their improvements, and promise them the amount if this estimate should be in any degree reasonable and if they would take a decided stand in favor of the treaty and conclude the same; (2) to conclude the treaty with a portion of the nation only should one with the whole be found impracticable, and compel the acquiescence of the remainder in its provisions. He was at once advised, on September 26, 1835, of the opposition of the President to any such action. He must make no particular promise to any individual, high or low, to gain his cooperation. The interest of the whole must not be sacrificed to the cupidity of a few, and if a treaty was concluded at all it must be one that would stand the test of the most rigid scrutiny. (History Cherokee Indians, Ethnological Bureau, p. 280.)

RED CLAY COUNCIL.

On October 23, 1835, at Red Clay, the Cherokee people in full council rejected the Ridge treaty, to which much reference has been made and which proposed that removal and subsistence should be deducted from the $5,000,000 fund. Even John Ridge and Elias Boudinot went with their people against this treaty. Mr. Schermerhorn on his own account, and contrary to the Cherokee law which placed the calling of the council in the hands of the principal chief, called a so called council at Echota, on December 22, 1835. Only a few were present. The Cherokees' regular council having sent John Ross and a delegation to Washington, to negotiate with the Government, Schermerhorn prevented the Ross delegation being received at Washington, and drew up a treaty of December 29, 1835, in which he disobeyed his instructions from the President, using not only bribes and threats but other unfair means. He reports himself that he told the Indians that their country "has already been virtually sold by the chiefs" (p. 461, Senate Doc. No. 120, Twenty-fifth Congress, second session.)

He says, in regard to making a treaty, October 27, 1835 (p. 484, Senate Doc. No. 120):

> The only hope I have of accomplishing it now is the fear of the Indians of Georgia legislation. Alabama and Tennessee, I think, will also pass some wholesome laws to quicken their movement.

With the small meeting which Schermerhorn collected at Echota he concluded a treaty on the 29th of December, 1835, with a delegation composed of John Ridge, Elias Boudinot, Archilla Smith, etc., who represented some three hundred people in favor of emigration and which appears on the face of the treaty was not the delegation authorized by the Cherokee people.

On December 31, 1835, Mr. Schermerhorn says:

> The whole of the expenditures since I have been in the nation negotiating, not including my own services, etc., or that of the secretary, amounting to about $3,000; and I believe all the accounts are in and settled up to this day, having made myself personally responsible to the disbursing agent for all advances, above the money in his hands, for this service (p. 496, Senate Doc. 120).

In point of fact, J. F. Schermerhorn paid the following persons for services and expenses in negotiating and concluding the treaty with the Cherokee Indians, dated December 29, 1835.

W. H. Underwood, attorney for the Cherokee Nation	$472.00
Do	298.75
James Starr	1,681.00
Andrew Ross	2,760.00
James A. Foreman	1,315.00
John Gunter	1,315.00
Longshell Turtle	1,315.00
Joshway Rogers	2,175.00
John Smith	2,175.00
William S. Coody	1,107.00
E. Boudinot	1,550.00
John A. Bell	1,200.00
William Rogers	1,310.00
Robert Sanders	1,200.00
Tayeskey	1,200.00
James Foster	1,200.00
John Fields	1,300.00
Major Ridge	1,280.00
George Welch	1,200.00
John Ridge	2,054.87
Stand Watie	1,419.00
James Fields	1,200.00

He acted as attorney for Boudinot, Bell, Rogers, Sanders, Tayeskey, Foster, Fields, Major Ridge, George Welch, John Ridge, Stand Watie, James Fields, and received for them over $16,000. He thus paid to the leaders of the so-called treaty party something over $30,000 for their "services and expenses" in negotiating and concluding that treaty. (See p. 1034, Senate Doc. No. 120, Twenty-fifth Congress, Second session, and Senate Doc. No. 199, Twenty-fifth Congress, Third session, vol. 3.)

Maj. William M. Davis, an agent of the Secretary of War in the Cherokee country, on March 5, 1836, informed the Secretary of War as follows (p. 27):

> I conceive that my duty to the President, to yourself, and to my country reluctantly compels me to make a statement in relation to a meeting of a small number of Cherokees at Echota last December, who were met by Mr. Schermerhorn and articles of a general treaty entered into between them for the whole Cherokee Nation. * * *
>
> I should not interpose in the matter at all, but I discover that you do not receive impartial information on the subject; that you have to depend upon the ex parte, partial, and interested reports of a person who will not give you the truth. I will

not be silent when I see that you are about to be imposed on by a gross and base betrayal of the high trust reposed in Rev. J. F. Schermerhorn by you. * * *

Sir, that paper * * * called a treaty is no treaty at all because not sanctioned by the great body of the Cherokees and made without their participation or assent. I solemnly declare to you that upon its reference to the Cherokee people it would be instantly rejected by nine-tenths of them, and, I believe, by nineteen-twentieths of them. There were not present at the conclusion of the treaty more than 100 Cherokee voters, and not more than 300 including women and children, although the weather was everything that could be desired. The Indians had long been notified of the meeting, and blankets were promised to all who would come and vote for the treaty. The most cunning and artful means were resorted to to conceal the paucity of numbers present at the treaty, etc.

Brig. Gen. E. G. Dunlap, in a speech to his brigade September, 1836, at their disbandment, said (p. 27):

I had determined that I would never dishonor the Tennessee arms in a servile service by aiding to carry into execution at the point of the bayonet a treaty made by a lean minority against the will and authority of the Cherokee people. * * * I soon discovered that the Indians had not the most distant thought of war with the United States, notwithstanding the common rights of humanity and justice had been denied them.

Gen. John E. Wool, of the United States Army, February 18, 1837, wrote to Adjutant-General Jones at Washington, speaking of the Cherokees (p. 27):

It is, however, vain to talk to a people almost universally opposed to the treaty, and who maintain that they never made such a treaty.

John Mason, jr., who was sent on July 15, 1837, as a confidential agent of the War Department to observe and report on the Cherokees, reported on September 25, 1837, as follows:

The chiefs and better-informed part of the nation are convinced that they can not retain the country, but the opposition to the treaty is unanimous and irreconcilable. They say it can not bind them, because they did not make it; that it was made by a few unauthorized individuals; that the nation is not a party to it.

The influence of this chief (John Ross) is unbounded and unquestioned. The whole nation of 18,000 persons is with him; the few, about 300, who made the treaty having left the country. It is evident, therefore, that Ross and his party are in fact the Cherokee Nation. * * * The officers say that with all his power, Ross can not, if he would, change the course he has heretofore pursued, and to which he is held by the fixed determination of his people. He dislikes being seen in conversation with white men, and particularly with agents of the Government. Were he, as matters now stand, to advise the Indians to acknowledge the treaty he would at once forfeit their confidence and probably his life. Yet, though unwavering in his opposition to the treaty, Ross's influence has constantly been exerted to preserve the peace of the country, and Colonel Lindsey says that he, Ross, alone stands at this time between the whites and bloodshed. The opposition to the treaty on the part of the Indians is unanimous and sincere, and it is not a mere political game played by Ross for the maintenance of his ascendency in the tribe.

(History Cherokee Indians, Ethno. Bureau, 286.)

Many were the public men who denounced in the most vigorous terms the policy of the Administration toward the Cherokees; for example, Daniel Webster and Edward Everett, of Massachusetts; Theodore Frelinghuysen, of New Jersey; Peleg Sprague, of Maine; Henry R. Storrs, of New York; Henry A. Wise, of Virginia; David Crockett, of Tennessee. Tennessee being one of the States interested, it was not to be expected that one of her representatives would have protested, but David Crockett, in a speech in the House of Representatives, denounced the treatment to which the Indians had been subjected at the hands of the Government as unjust, dishonest, cruel, and short-sighted in the extreme. He alluded to the fact that he represented a district which bordered on the domain of the southern tribes, and that his constituents were perhaps as immediataly interested in the removal of the Indians as those of any other member of the House. His voice would perhaps not be seconded by that of a single fellow member living within

500 miles of his home. He had been threatened that if he did not support the policy of forcible removal his public career would be summarily cut off. But while he was, perhaps, as desirous of pleasing his constituents and of coinciding with the wishes of his colleagues as any man in Congress, he could not permit himself to do so at the expense of his honor and conscience in support of such a measure. (History of Cherokees, Ethnological Bureau, p. 288.)

With overwhelming evidence of fraud and that the treaty was not recognized by the Cherokees, it is almost unnecessary to present the numerous Cherokee protests and memorials, except for the sake of the record. The principal memorials are as follows (p. 25, 29, 39, 41, etc.):

March 8, 1836, H. Doc. 286, Twenty-fourth Congress, first session, volume 7.
June 24, 1836, H. Doc. 286, Twenty-fourth Congress, first session, volume 7.
September 28, 1836, H. Doc. 99, Twenty-fifth Congress, second session, volume 5, p. 10.
September 30, 1836, H. Doc. 99, Twenty-fifth Congress, second session, volume 5, p. 7.
December 8, 1836, H. Doc. 99, Twenty-fifth Congress, second session, volume 5, p. 14.
February 22, 1837, H. Doc. 99, Twenty-fifth Congress, second session, volume 5, p. 4.
December 15, 1837, H. Doc. 99, Twenty-fifth Congress, second session, volume 5, p. 1.
August 8, 1837, H. Doc. 99, Twenty-fifth Congress, second session, volume 5, p. 15.
March 16, 1837, H. Doc. 99, Twenty-fifth Congress, second session, volume 5, p. 18.
February 22, 1838, H. Doc. 316, Twenty-fifth Congress, second session, volume 9.

The sum and substance of these petitions is to set forth the fact that the Cherokees under the treaties with the United States owned their lands and property; that Georgia determined to possess them and passed laws depriving the Cherokees of every right of property and liberty, and that their appeals to the United States were in vain; that the treaty of 1835 was made in defiance of the laws and customs of the Cherokees; was not made by the Cherokee people; was not consented to by them, and was a fraud upon the United States and upon the Cherokee Nation.

In their first protest of March 8, 1836, among other things, they say:

To the honorable the Senate of the United States of North America in Congress assembled:

This memorial and protest of the Cherokee Nation, by their duly authorized delegates, fully empowered and sent by said nation to negotiate a treaty arrangement with the United States, respectfully showeth:

That since they left their nation for Washington City the Rev. John F. Schermerhorn, the United States commissioner, convened a few of the Cherokee people at New Echota, and entered into a contract with them in the form of a treaty, which has been submitted to your honorable body for ratification. This instrument purports to be a contract with the Cherokee people, when in fact it has been agreed upon in direct violation of their will, wishes, and interests by a few unauthorized individuals of the nation, as will be made manifest in this memorial and protest.

* * * During the last winter the Cherokees had a regular delegation at Washington City, composed of John Ross, principal chief; Richard Taylor, Samuel Gunter, William Rodgers, and Daniel McCoy, as may be also seen among the recited documents, vested with powers to negotiate a treaty with the United States. They made two propositions—the one for a partial cession and to be secured in the residue; the other, upon a basis not authorized, but proposed conditionally, to sell the whole country for a gross sum of money.

The President thought the amount asked extravagant. The delegation requested that he should bring the matter before the Senate and take their advice as to what should be done under all the circumstances. To do this the delegation are informed he declined, yet the matter was gotten before the Senate, not in the way the delegation had asked or expected, and that body by resolution expressed an opinion that a sum not exceeding $5,000,000 ought to be allowed for the Cherokee country. But before this was done John Ridge, Archilla Smith, Elias Boudinot, S. W. Bell, John West, Williams A. Davis, and Ezekiel West, individuals of the Cherokee Nation, without authority from the nation, had made their appearance in Washington City and with them the Government had commenced a negotiation for a treaty. The delegation have been informed that anterior to the matter being brought before the Indian Committee, the War Department had agreed with the above individuals upon a treaty at $4,000,000, and perhaps less, and that their willingness to receive that sum was made known to the Senate. What influence the fact had upon the action of

that body the delegation pretend not to determine, but of one thing they are sure, if it had any, it could not be for the interests of the Cherokee people.

On the 14th of March, 1835, only ten days after the opinion of the Senate as to the price that ought to be given, the United States entered into articles of a treaty with the before-named individuals, which were, by the President of the United States, directed to be submitted to the Cherokee Nation of Indians for their consideration and approbation, etc.

At great length the details of oppression, threats, violence, arrest, and imprisonment is set forth, with a history of how the pretended treaty was made, and they close as follows:

The delegation are sure it can not be the wish of the Senate of the United States to ratify and have enforced upon the unoffending Cherokee people a treaty made without their authority, false upon its face and against the known wishes of the nation. Such is the instrument submitted to your honorable body. For the truth of this statement, should the Senate require further proof, it can be obtained from numerous persons of unimpeachable integrity and veracity. But if it be the fate of the Cherokee people, and the decree has gone forth that they must leave their homes and native land and seek a new residence in the wilds of the Far West, without their consent, let them be expelled and removed by an act of Congress, that they or their posterity in after times may have some claims upon the magnanimity of the American people.

The delegation do solemnly declare they would consider such an act preferable and more humane than the ratification and enforcement of a fraudulent treaty false upon its face and made without the consent of one of the professed contracting parties. The past history of the United States furnishes admonition against the ratification of treaties made with unauthorized individuals. Resting upon the sacred rights of the Cherokee Nation so often recognized, and solemnly guaranteed on the faith of treaties, the delegation now appeal to the sympathies, the honor, the good faith and magnanimity of the United States to preserve and protect their Nation from fraud, rapine, plunder, and destruction. * * * We are all children of the same Great Parent and bound to be kind to each other without regard to the situation in which we may be placed. If an earthly parent have a child unfortunately weak and poor, how would he feel to see the brothers of that child abusing it for its misfortunes, insulting its feelings, exulting in their own superiority, curling the lip of scorn with a significant cast of the head at its earnest supplications for justice? Let every man's own heart give him the answer. You have before you that unfortunate child in the weak and dependent Cherokees.

With hands elevated toward the throne of grace and mercy we all supplicate, saying:

"Our brothers, is it true you will drive us from the land of our nativity and from the tombs of our fathers and our mothers? We know you possess the power, but by the tie that unites us yonder, we implore you to forbear."

This prayer is a sample of the others.

It should be observed that the Western Cherokee Nation, to whom had been conveyed the western lands, joined with the Eastern Cherokee Nation in their protest against the alleged treaty of 1835.

The Cherokee Nation both East and West continued to protest against the treaty of 1835, declaring it void, until the treaty of 1846 was entered into, filing numerous petitions setting this forth in various ways to which reference is here made.

June 9, 1838; page 29, H. Doc. 120; Twenty sixth Congress, first session.
June 11, 1838; page 31, H. Doc. 120; Twenty-sixth Congress, first session.
July 21, 1838; page 34, H. Doc. 120; Twenty-sixth Congress, first session.
August 1, 1838; page 37, H. Doc. 120; Twenty sixth Congress, first session.
June 13, 1839; page 70, H. Doc. 120; Twenty sixth Congress, first session.
February 28, 1840; page 1; H. Doc. 120; Twenty sixth Congress, first session.
November 11, 1840; page 48, H. Rep. 1098; Twenty-seventh Congress, second session.
January 23, 1843; page — H. Doc. 93; Twenty-seventh Congress, third session.
March 30, 1844; H. Doc. 235; Twenty-eighth Congress, first session. Volume 5.
April 13, 1844; H. Doc. 234; Twenty-eighth Congress, first session. Volume 5.
February 22, 1845; S. Doc. 140; Twenty-eighth Congress, second session. Volume 8.
April 30, 1846; S. Doc. 331; Twenty-ninth Congress, first session. Volume 7.

And when the treaty of 1846 was pending the only thing upon which the Cherokee Nation East, the Cherokee Nation West, and the so-called

treaty party were entirely agreed was that the cost of removal and subsistence were not chargeable to the trust fund. A copy of which their several positions is hereto attached as exhibits, taken from their proposals in the settlement of 1846 (p. 53).

To comprehend the position of the Eastern Cherokees it has been necessary to show that until the treaty of 1846 was entered into they gave no recognition to the treaty of 1835, and even as individuals before accepting payment for their individual property they did on August 1, 1838, pass the following resolution:

Resolved further, That the Cherokee people, in consenting to an investigation of their individual claims, and receiving payment upon them, and for their improvements, do not intend that it shall be so construed as yielding or giving their sanction or approval to the pretended treaty of 1835, nor as compromitting in any manner their just claims against the United States hereafter, for a full and satisfactory indemnification for their country, and for all individual losses and injuries.

And in their memorial of February 28, 1840, above referred to, they pray for (p. 46)—

"Indemnification for the country which has been taken away from them east of the Mississippi, etc.," in response to which they finally succeeded in obtaining a promise from President John Tyler, of a new treaty that should be satisfactory and just. The President says in this letter of September 20, 1841 (H. Rep. 288, Twenty-seventh Congress, third session):

Upon the ratification of the treaty contemplated which shall give to the Cherokee Nation full indemnity for all wrongs which they may have suffered, etc., I shall rejoice, etc.

On December 20, 1842 (see p. 22, H. R. Ex. Doc., 234, Twenty-eighth Congress, first session, vol. 5), John Ross, principal chief, having been requested to lay before the National Council a statement of the amount of money received by him from the Government of the United States since the year 1835, replied among other things that he had never received any money under the treaty of 1835, declared that he and the Cherokee people had always disclaimed that contract, that their claims against the United States still remained open and unadjusted, but that they had the unequivocal promise of the President of the United States that they should be satisfied.

In 1844 the Secretary of War appointed a commission of Jones, Mason, and Butler, hereinafter referred to, who very strongly recommended a new treaty, as recommended by President Tyler, etc., and set forth the reasons why the United States in good conscience were in honor bound to pay the Cherokees their per capita.

The treaty of 1846 was the one contemplated and finally effected and proclaimed August 17, 1846.

This history fully shows that the Eastern Cherokees and their principal chief, John Ross, never recognized the treaty of 1835, except in the manner prescribed in the treaty of 1846, and in no manner whatever until August 17, 1846.

COMMISSIONER MEDILL'S REPORT.

Commissioner Medill has suggested that the Eastern Cherokees under John Ross were informed by General Scott that—

as the Cherokee people are exclusively interested in the cost as well as the comfort of the removal, I do not feel at liberty to withhold my sanction [to John Ross's estimate]. The commissioner says that the Secretary of War, in reply to General Scott upon the subject, took the same view—he was of opinion that the amount was very extravagant; that $30 per head had been regarded as sufficient, and that "what-

ever sum over and above this amount that may be expended for this purpose will have to be deducted from the original purchase money agreed to be paid them by the treaty of Echota (the $5,000,000), and this must be fully explained to the chiefs and head men, and ought to be understood by the nation." (P. 17, 2d. Doc. 65, Thirtieth Congress, first session, H. R.)

The commissioner does not say in his report that General Scott only communicated this to John Ross on November 15, 1838, after the entire expedition was practically too far advanced, all the detachments being on the road, for the contract to be in any degree changed. (See the evidence of Winfield Scott, last line of page 38, House Report 288, March 2, 1843.) Commissioner Medill fails to state that John Ross and the Eastern Cherokees while in General Scott's camp under capture in the same resolution which authorized the delegation to negotiate with General Scott for their self emigration on July 21, 1838, did enter their solemn protest against the pretended treaty of Echota and referred to the fact that their delegation had just returned from Washington City "under a special understanding with the honorable the Secretary of War." Commissioner Medill omits to state the fact that the Secretary of War in his letter to John Ross and his delegation on May the 18th, 1838, said to them:

If it be desired by the Cherokee Nation that their own agents should have the charge of their emigration their wishes will be complied with and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect. With regard to the expense of this operation, which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made to Congress.

Commissioner Medill fails to state that the Secretary of War on June 1, 1838, wrote to General Scott, that—

It is proposed to make such allowances to the Cherokees as it is believed were intended originally to have been made by the Senate.

That is to say, that the $5,000,000 fund should not be charged with removal, but removal paid by the United States. (See p. 3, H. Doc. 453, Twenty fifth Congress, second session.)

Commissioner Medill fails to point out that the Secretary of War on May 23, 1838, wrote General Scott as follows:

WAR DEPARTMENT, *May 23, 1838.*

SIR: You will receive herewith a copy of proposals (already communicated to Congress by the President) made by the Department to the Cherokee delegation now in this city, which it is believed will be accepted by them. You are therefore hereby authorized to enter into an agreement with the agent of the nation for the removal of their people. The expenses attending the emigration of the Cherokees are now fully ascertained by past experience; and it is presumed you will find no difficulty in making such an arrangement as, while it will secure their comfortable removal in the manner most agreeable to their chiefs and head men, will effectually protect the interests of the United States and prevent all unnecessary delay or useless expenditures.

Commissioner Medill fails to state the authority which was given to John Ross and his associates for the removal of the Cherokees. It is as follows:

They are hereby authorized and fully empowered to make and enter into any and all such arrangements with Major-General Scott on the part of the United States which they may deem necessary and proper for effecting the entire removal of the Cherokee people from the east to the west of the Mississippi River, and also to enter into such further arrangements with the Commanding General in relation to the payment of such sums of money by the United States as may be necessary for the removal and subsistence of all the Cherokee people.

This limited resolution was passed on July 26, 1838, and is the only authority the Cherokees gave.

It contemplated the payment by the United States of this removal. How could General Scott or John Ross go beyond it and bind the Cherokees?

It contemplated the "special understanding of the honorable Secretary of War," who had advised General Scott it was "proposed to make such allowances to the Cherokees as it is believed were intended originally to have been made by the Senate."

That is, the Senate intended the $5,000,000 fund should not include the cost of removal. The special understanding of the Secretary of War was that the expense of removal or self-emigration by the Eastern Cherokees should—

be defrayed by the United States, and an application for such further sums as may be required for this purpose shall be made to Congress.

With what face can he after this say a part of "such further sum as may be required for this purpose" shall be charged to the Cherokee trust fund?

It is true that General Scott was under the impression as he says, on August 2, 1838, that—

"The Cherokee people are exclusively interested in the cost as well as the comfort of the removal," but he said nothing whatever about the trust fund. He had before him the letter of the Secretary of War agreeing that the cost of removal, in his opinion, should be borne by the United States, and he was instructed by the Secretary of War to protect the interests of the United States. It is true that he thought the estimate extravagant, but it is also true in his testimony that the terrible drought of that summer led him to give it his approval. General Scott says, on page 37, H. Report 288, Twenty-seventh Congress, third session:

The drought that nearly desolated so many States in 1838 commenced in the southwest at the end of May and continued into October. During the latter eight or ten weeks of its continuance it would have been impossible for a detachment of 100 Indians, with their horses, to have found water on the land routes for many and many marches together; hence all the subsequent difficulties and embarrassments in my plans, and the emigration itself; for, but for the drought, I would have quashed the contract with Lewis Ross as extravagant, and the renewed movement beginning with September would have escaped ice, snow, and bad roads and been ended in eighty days by each detachment. The drought was a calamity to the country generally, and particularly so to the poor Cherokees.

The United States agree to pay the expense, but because the drought doubles the expense the Cherokees become liable for the additional cost. This is magnanimous, indeed.

Commissioner Medill quotes a part of the letters of General Scott of August 1 and August 2, 1838, and leaves the impression that General Scott advised the Cherokees that the cost of the removal under Ross contract might be charged to the trust fund.

The fact is, August 1, 1838, General Scott says: "The whole expense of the emigration is to be paid out of the *appropriations* already made by Congress, the general surplus of which is to go to the Cherokee Nation in various forms."

The only appropriations made for removal by Congress was the $680,000 and the $1,047,000.

The trust fund of $5,000,000 (less $500,000 for land in Kansas) was not appropriated for removal, but "for the amount stipulated to be paid for the lands ceded."

General Scott referred to the appropriations for *removal* and to no other appropriations, as further appears from his letter of July 25, 1838, requiring the Ross contract to include fugitive Creeks residing

with Cherokees and agreeing that the United States, under such contract proposed, would "pay over to the Cherokee functionaries, from time to time, such portions of the moneys *appropriated for the emigration* as may seem reasonable," etc.

It is true that General Scott indicates in his evidence (p. 37) that on November 15, 1838, he advised Ross that the United States would use the trust fund after exhaustion of the sums appropriated for removal, etc., but that was one hundred and seven days after the Ross contract was made, and too late to make any changes. It appears from Commissioner Medill's report that General Scott's letter of November 15, 1838, was written on a suggestion from the War Department.

Change in a contract requires the consent of both parties. No pretense is made that the Cherokee council agreed to any change. It could not even meet till emigration had been completed.

Commissioner Medill fails to state that over 600 Cherokees died on the road from exposure.

Commissioner Medill thinks it right to charge the Cherokee trust fund with $581,346.88, which was paid to John Ross on his contract, and justifies this by saying:

> Whether this sum was actually absorbed in the mere removal of the Indians or not, it was paid on the demand of the Cherokees themselves, and they must be considered as having enjoyed the benefit of it in that or some other way; and the amount for per capita distribution was thus materially diminished.

The Cherokee Nation was forced by bayonets to the attitude of contracting their self-emigration, and because they demand payment it follows that they should be paid out of their own money. Secretary Poinsett proposed to the Cherokees self-emigration at the expense of the United States, so advised General Scott. The Cherokee council authorized their leaders to make—

> Arrangements with the commanding general in relation to the payment of such sums of money by the United States as may be necessary for the removal and subsistence of all the Cherokee people.

Commissioner Medill seems to think this does not really mean "by the United States," but by the United States as trustee of a fund these Indians bitterly denied.

These same people at the same time repudiate the treaty of 1835 and any alleged trust fund thereunder, and still do so on November 11, 1840, when they authorized John Ross to demand payment in their name, and at that same instant show by the preamble that they understood in making the demand it would and ought to be paid out of the United States Treasury and not out of any trust fund whatever; yet, Commissioner Medill, entirely overlooking all these things, says:

> They must be considered as having enjoyed the benefit of it in that or some other way.

Their enjoyment of this removal is exhibited by their piteous and unavailing appeals for mercy, and by the graves of their dead that marked every mile of the road, and by the cries of their women, bearing children in the hot sun, covered with dust, in a desolating drought, in jolting wagons over the roughest roads. This contract was not sought by the Cherokees.

It was a measure of economy to permit the mustering out of an army of 10,000 men thought necessary to enforce a perfidious instrument, which was equally a fraud on the United States and on the unhappy Cherokees.

Commissioner Medill fails to point out that if John Ross and his self-

emigrating Cherokees had been emigrating themselves under the treaty of 1835 they would have been restricted to $20 per capita for such removal under article 8 of that treaty.

Commissioner Medill fails to point out that the United States, as trustee, could not in justice to the cestui que trust under the fifteenth article have allowed exceeding $20 per capita to any self-emigrating Cherokees.

Commissioner Medill fails to point out that in the treaty of 1846, article 4, the principle is laid down that only $20 per capita shall be charged for removal against the $5,600,000. In other words, by this article, in settling with the Old Settlers, or Western Cherokees, the trust fund was not to be charged with removal. Commissioner Medill's report finds that the Western Cherokees who are entitled to a sum equal to one-third of the balance under the fifteenth article of the treaty of 1835, are entitled to $419,763.96, while the Eastern Cherokees, who are entitled to three times as much, or the entire balance under the same article, he only allows $184,071.28, instead of $1,259,291.88. (See pp. 16 and 20, H. R. Ex. Doc. 65, Thirtieth Congress, first session.)

Commissioner Medill, in settling with the Old Settlers, finds the balance under the fifteenth article of the treaty of 1835, $1,259,291.88. (See page 19, ibid.)

In settling with the Eastern Cherokees, on page 14, he finds the balance under the same article 15, treaty of 1835, $184,071.28.

Commissioner Medill has juggled these accounts in a manner nothing short of scandalous. He charged the emigrant Cherokees over $5,000 more than the Western Cherokees under the seventeenth article.

He charges the emigrant Cherokees over a million dollars more than the Western Cherokees on account of removal and subsistence, etc.

He charges the Western Cherokees against the $600,000 fund for spoliations and rents and reservation and preemptions, not one of which is justly chargeable against this fund under Attorney General Butler's opinion, and thus consumes the fund notwithstanding the fact that by the report of the Second Auditor, of August, 1842, submitted by J. C. Spencer, Secretary of War, to Hon. James Cooper, chairman of the Committee of Indian Affairs, it is shown that this $600,000 was practically consumed for removal at that time. (H. R. Rpt., 288 Twenty-seventh Congress, third session, Vol. IV, p. 52.)

For further answer that the account of John Ross, or of the Cherokee Nation, was against the United States and not against the trust fund, attention is called to H. Report 1098, Twenty-seventh Congress, second session, and H. Report 288, Twenty-seventh Congress, third session, wherein it appears that every one of the accounts was rendered against the United States, and in no case against the trust fund, and where it appears from the affidavits of numerous witnesses, to wit, Gideon Morris, Gary Hinnant, John Howard Payne, etc., who show that Ross never did consider his claim except as a claim on the United States and not on the trust fund. That neither Ross nor the Cherokees recognized the existence of a trust fund, and that President Tyler, in ordering it paid in his letter of September 20, 1841 (page 49, H. Report 288, Twenty-seventh Congress, third session), was evidently under the impression that he was settling the claim of the Cherokees against the United States, and not of the Cherokees against the trust fund whose existence they denied in their memorial to him, and in which they had demanded indemnity for the wrongs of 1835, and were by him promised indemnity for those wrongs.

This mass of evidence showing that this account was against the

United States has no evidence whatever to the contrary, the absence of which is itself testimony of the most important character that the account was against the United States alone.

It has been charged that John Ross was grossly unjust in insisting on the settlement to the extent he did under his contract with General Scott. These complaints, which were vigorously urged against him, would seem to be set at rest by the final decision in his favor that his claim was just, made by President Tyler.

It should be remarked that under the Ross contract for removal the amount provided by Congress of $1,047,067 and the $335,105.91 applicable for removal out of the $600,000 would more than have paid the actual cost of removal under the John Ross contract, even including the $581,346.88 due to the delays caused by the drought and heavy winter weather, as explained by General Scott.

It should be kept clearly in mind that whether removal was justly chargeable under the Scott contract to the United States or to the trust fund does not depend on the amount involved, but on the understanding of the Indians who made it, under their authorized understanding with the Secretary of War, and their authority given to Ross.

THE TREATY PARTY INTERPRETATION OF THE TREATY OF 1835.

The treaty party take the following view of the treaty of 1835 in regard to removal:

That the Senate had offered them $5,000,000 for their land and possessions.

That the United States were under contract to remove every Cherokee from the East to the West at the expense of the United States.

That to use the purchase money of their lands for removal was using the consideration price to pay a subsisting obligation of the United States Government and was precisely the same thing as not paying the purchase price.

The treaty party insists that they did not intend to agree that removal should be charged to the trust fund; that the Senate did not intend it should be done; that for this reason they expressly agreed to leave it to the Senate to say what their intention was, and that the Senate did decide that it was not the intention of the Senate to charge the purchase price with the cost of removal.

That on Schermerhorn's own estimate as shown in the treaty he urged the Cherokees to agree to on October 23, 1835, at Red Clay, he estimated spoliations and removal combined at $505,000, or $250,000 for spoliations and $255,000 for removal, and that by Schermerhorn's own estimate, as shown in article 3, supplement 1835, which he himself drew, it was represented to the Senate that $600,000 would cover spoliations and removal and leave a surplus for the education fund.

The treaty party insist that if the estimate was erroneous and proved by subsequent events to have been entirely too small, this circumstance can not be argued to affect the intention of the contracting parties. If the parties did not intend to charge the trust fund with removal when the treaty was made, no different interpretation can be subsequently attached thereto, except by a formal agreement, which is not anywhere pretended to have been made. The treaty party insist that if on May 23, 1838, the trust fund was chargeable with removal, there being an abundance of such trust fund on hand with which to pay the entire cost of removal, the House of Representatives would not have passed a reso-

lution directing the Secretary of War to make an estimate for removal and subsistence.

If the trust fund was chargeable, the Secretary of War would have had no excuse for agreeing with John Ross that the expense of removal should be borne by the United States, as he did do on May 18, 1838.

If the trust fund was chargeable, the Secretary of War would have had no excuse to estimate for an amount sufficient to pay the entire cost of removal, as he did do on May 25, 1838.

If Congress itself had not intended to stand firmly by the construction of the treaty as heretofore set forth and which existed in 1836, when the treaty was made, Congress would not have appropriated a sum sufficient to meet the entire amount estimated as necessary to pay the whole cost of removal out of the United States Treasury.

The fact that Congress made such an appropriation proves that Congress believed that the Secretary was right in his proposal to Congress, and which proposals were before Congress, wherein the Secretary declared the United States ought to pay the cost of removal.

The treaty party insist that this was not a sudden burst of generosity, but that it was in accordance with the view theretofore entertained by the War Department, which held that the United States, under the treaty of 1828, were chargeable with removal and subsistence, as will appear from the letter of Mr. Commissioner of Indian Affairs Harris to B. F. Curry, Cherokee Indian agent, as follows:

SIR: I acknowledge the receipt of your letter of the 26th of October last, and in reply have to observe that I have taken the decision of the Secretary of War ad interim upon the claims of the Cherokees to commutation for subsistence at $33.33 each. The Secretary decides that the commutation may be paid at the rate above stated, but at the same time declares that *the allowance is made under the treaty of 1828.* (S. Doc. No. 120, vol. 2, p. 209, Twenty-fifth Congress, second session.)

That under the treaty of 1835 enrollment books for voluntary emigration were opened in the then Cherokee country. Instructions as to the nature of the enrollment were sent by the Acting Secretary of War, C. A. Harris, to Lieut. J. Van Horne, United States Army, dated September 12, 1837, in part as follows:

Enrolling books must be prepared on the following plan: A memoranda or entry must be inserted purporting that the subscribers assent to a treaty with the United States upon the terms *heretofore offered by the President to their people*, and that if no treaty should be made during the next fall or early in the winter, then the subscribers will cede to the United States all their right and interest in Cherokee lands east of the Mississippi, upon the following conditions: That they shall receive, so fast as Congress shall make the necessary appropriations, the ascertained value of their improvements on their arrival West; *that they shall be removed and subsisted for one year at the expense of the United States;* that they shall be entitled to all such stipulations as may be hereafter made in favor of those who do not now remove, etc.

The Cherokees were thus told, September 12, 1837, that they should be removed and subsisted for one year at the expense of the United States and be offered the terms heretofore offered by the President, to wit, $150 each per capita. The payment of the present claim, found due by the Department of the Interior, excluding interest, would only make a total per capita of $124.78, and in 1852, instead of being paid $150 they were only paid $56.31 per capita, and this is the ground of their present complaint.

The treaty party further complain that when they made the treaty of 1835 they were promised protection; that they did not receive it; that their leaders were killed; that they were ostracized and the per capita promised to them never paid; that it is now due and no just excuse can be found for not paying it.

COMMISSIONER MEDILL'S VIEW.

Commissioner Medill, upon whose report of May 10, 1848, the error rests for the unlawful withdrawal from the trust fund of a large sum on account of removal, submits the following argument:

[We assume it will only be necessary to answer the reasons which he assigns, and that his dictum in the absence of reason in support thereof will not be permitted to control in defiance of substantial argument to the contrary.]

The first reason offered by Commissioner Medill is that the correspondence prior to the negotiation of the treaty shows that removal and subsistence in the schedule submitted were to be deducted from the $5,000,000 fund "to be given for the lands, or, rather, as the difference in value between them and those assigned to the Cherokees West," etc. He refers to Secretary Cass's letter, that—

"No proposition for a treaty will hereafter be made more favorable than those now offered to them," as proof that removal and subsistence was to be deducted from the $5,000,000, and was so understood by the Indians.

Commissioner Medill omits to state that this proposed treaty, with its schedule, was unanimously rejected by the Cherokees in general council October 23, 1835, even Ridge and Boudinot voting against it.

Commissioner Medill omits to quote the second article of the supplement, treaty of 1835, in which appears plainly recorded the intention both of the Cherokee citizens (who were paid to negotiate this treaty) and the Senate of the United States that the $5,000,000 trust fund should not include removal. He omits to state the construction of the Department of War of November 18, 1836, to Cherokee Indian Agent Curry, above quoted, and the construction of September 12, 1837, to Lieutenant Van Horne, above quoted. He omits to mention Secretary of War Poinsett's agreement with John Ross of May 18, 1838, that removal should be at the expense of the United States.

He omits to state that the Secretary of War instructed General Scott that it was proposed to make such allowances to the Cherokees as it is believed were intended originally by the Senate, i. e., that the trust fund should not include removal.

In the above quotation from the Commissioner he intimates that the $5,000,000 was paid the Cherokees East "as the difference in value between the lands East and those assigned to the Cherokees West," as if those assigned to the Cherokees West was a part of the consideration to the Cherokees East under the treaty of 1835. The lands West had been guaranteed to the Western Cherokees under the treaties of 1828 and 1833. The Eastern Cherokees acquired not one acre of such lands by the treaty of 1835; what they did actually get was the bitter hostility of the Western Cherokees, upon whom they were injected.

It is true that two Western Cherokees signed the treaty of 1835, but it is also true the men who did it, James Rogers and John Smith, had no authority to sign such treaty. It is also true that Schermerhorn wrote the following letter to the Commissioner of Indian Affairs with regard to the delegation of the Western Cherokees:

> If they are true and faithful they may be of great service, and if they are not, I have told Coody what I should be obliged to do in reference to them. (Page 482, S. Doc. 120, Twenty-fifth Congress, second session.)

And it is also true that Schermerhorn paid Coody $1,407 and that he paid James Rogers and John Smith, who signed the treaty, $2,175 each, or a total of $5,747 for their services (p. 1034, Sen. Doc. 120), and that

Schermerhorn thus violated the instructions of President Jackson, that he "must make no particular promise to any individual, high or low, to gain his cooperation. The interest of the whole must not be sacrificed to the cupidity of a few."

Commissioner Medill says:

> The question was raised whether the spoliations, the cost of removal, and claims which many of the Cherokees had against the United States were to be paid for out of the consideration money for the lands. This question having been submitted to the Senate, it was agreed to allow the additional sum of $600,000 toward those objects, and in lieu of the annulled grants of preemptions and reservations. This was not an assumption by the Government of the whole cost of removal and of all the spoliations and other claims against the United States, but only an extension and increase of the consideration money with reference to those objects. Had the former been intended, an estimate would have been made of the probable cost of removal and of the probable amount of the claims (except the spoliations, which were limited by the treaty to $30,000), in order that the additional amount to be allowed might be made to embrace all; but this was not done.
>
> It was a compromise between the Government and the Cherokees. * * * It was, in effect, an increase of the consideration money granted, etc.

These bold statements are unsupported by any sound reason and are contradicted by the facts of the history.

Commissioner Medill in the above quotation omits to mention that the second article, supplement 1835, expressly declared the intention of the Cherokees who negotiated the treaty and the Senate of the United States to be that the trust fund should not include removal. Commissioner Medill does not hesitate to construe the trust fund to include removal, in direct conflict with the declared intention of both parties and in conflict with the rulings of the War Department of November 18, 1836, and of September 12, 1837, of May 18, 1838, of May 25, 1838, and of June 1, 1838, heretofore cited, that removal was chargeable to the United States and not to the trust fund.

And what reasons besides his fatal omissions does Commissioner Medill offer? He quotes certain commissioners with approval, and offers no other reason. These commissioners are alleged to be those who were appointed in July, 1846, to inquire into matters in dispute between the Cherokees and the United States, and who, under a subsequent appointment, negotiated the treaty of 1846.

These commissioners, as quoted by Commissioner Medill, repeat the argument we have already answered, to wit, that the negotiations in the proposed treaty in the spring of 1835 showed that the Government officers proposed to deduct "removal" from the purchase money offered by the Senate. We have abundantly answered this argument by showing that on this very account, among others, the proposed treaty was rejected by the Cherokee people in full council at Red Clay October 23, 1835, against which even Ridge and Boudinot voted (History of Cherokee Indians, p. 280), etc., as above set forth.

The commissioners quoted by Commissioner Medill, omitting all the record to which we have referred, without other argument, add as a conclusive proposition two sections from Senator White's report (S. Doc. 466, second session Twenty-fifth Congress), to wit:

> They believe the $5,000,000 given by the treaty as the difference in value between the countries exchanged and the $600,000 before mentioned, allowed for spoliations, and as a fund for removal, constitute a very liberal consideration on the part of the Federal Government; yet the committee would feel much better satisfied that too much should be done for the Cherokees than too little. If, therefore, the voluntary grant of an additional sum of money can be made the means of hastening their removal to their new home, of dispensing with the use of a large military force, and of insuring confidence in the justice of the Government and of restoring harmony and good feelings, they believe economy, humanity, and peace will be best consulted by making such grant.

With a view to attain these objects the committee would respectfully recommend to the Senate that in the passing of some appropriation bill still to be acted on an item be inserted placing a reasonable sum of money at the disposal of the Executive.

The commissioners, commenting on these two paragraphs, triumphantly say that the subsequent appropriation of $1,047,067 was a voluntary grant made for the purpose of hastening the removal of the Indians, etc., and "the expenditures specified in the fifteenth article are therefore justly chargeable upon the treaty fund."

[The conclusions of the commissioners wrongfully appear as a part of Senator White's report in Ex. Doc. 65, Thirtieth Congress, first session.]

The fact that Senator White, in a very brief report giving some reasons for supporting the estimate of the Secretary of War, refers to the appropriation as a voluntary grant, is seized upon as proof that removal was justly chargeable upon the treaty fund.

It should be remembered that Senator White and his committee were not passing upon the proposition as to whether or not the trust fund was chargeable with removal, but were only giving reasons for supporting the estimate of the War Department, which came before the committee on the Secretary of War's letter containing the proposals to John Ross, that the expense of removal should be defrayed by the United States. Senator White supports the Secretary under the impression that it was a voluntary grant. This proves nothing except as to Senator White's opinion, as he gives no reason for thinking it a voluntary grant except that the committee thought the Government had been liberal in theretofore granting $5,600,000 "as the difference in value between the countries exchanged" by the treaty of 1835.

Senator White would have been justified in his conclusion that $5,600,000 was a very liberal consideration if it had been in fact given as the difference in value between the countries exchanged; but there were no countries exchanged by the treaty of 1835. Judge White imagined that the Cherokees had received 14,000,000 acres in exchange for the land they relinquished in 1835. The treaty as drawn might leave this impression, but in point of fact every acre of this land had been deeded to the Western Cherokees under the treaties of 1828 and 1833, and the Eastern Cherokees were receiving by the treaty of 1835 14,000,000 acres less than he thought.

More than that, Judge White's committee recommended a reasonable sum, and the Senate thought it reasonable to appropriate enough to pay the entire cost of removal, as estimated by the Secretary of War.

The committee report purports only to have had under consideration the estimate and the letter of the Secretary of War. The committee made no examination into the questions involved, and as to the $600,000 the committee says:

How this fund has been disposed of or whether any or what part of it yet remains to be expended the committee do not know.

And as to the commutation of the annuity of $10,000, under the treaty of 1835, and the stipulations in relation thereto, the committee says:

How far this stipulation has been complied with the committee do not know.

These are the simplest items and are only mentioned to show that the committee had given no special examination to the questions involved and had no intention of deciding them, nevertheless the commissioners triumphantly declare that—

The expenditures specified in the fifteenth article are therefore justly chargeable upon the treaty fund.

And Commissioner Medill has this conclusion appear in his report as if it were a part and parcel of Senator White's report.

Commissioner Medill thus quotes the report of the Indian committee, which did not have this subject under consideration, and draws an unwarranted conclusion from such report. He omits to quote the opinion of the Senate Committee on Indian Affairs, which did have this entire subject before them, and had in the preceding year made a report fully sustaining the Cherokees' construction of this treaty as sound and conclusively right, to wit, the report made by the Committee on Indian Affairs of the United States Senate on February 19, 1837, as follows:

REPORT OF THE COMMITTEE ON INDIAN AFFAIRS OF THE UNITED STATES SENATE.

[Jarnigan Report.]

The Committee on Indian Affairs, to whom was referred the memorial of David Vann and William P. Ross, delegates from the Cherokee Nation, respectfully report the following facts, which will enable the Senate to decide the various questions upon which the Cherokee delegation and the commissioners appointed to treat with them in July last could not agree, and which, by the terms of the treaty of the 6th of August, 1846, were to be submitted to the arbitrament of the Senate, whose award was to constitute a part of that treaty. The peace and happiness of the Cherokee Nation so imperiously demanded the immediate adoption of that treaty that the Cherokee delegation could not refuse their assent to it, leaving certain questions to the arbitrament of the Senate. Peace and quiet have been restored in the Cherokee country, and it now only remains for the Senate to decide the questions which have been submitted to it that the account may be finally made up and closed.

The first of these questions is, whether, by the treaty of the 29th of December 1835, it was the understanding of the parties that the various sums since charged to the $5,000,000 fund given by that treaty have been properly so charged. On the 28th of February, 1835, a delegation from the Cherokee Nation proposed to submit the terms of the treaty to the arbitrament of the Senate of the United States. In considering the subject the Senate only looked to the value of the lands and have so said in language most explicit. The preamble to that treaty recites the submission which had been made to the Senate, and then adds:

"And whereas, on such submission, the Senate advised that a sum not exceeding $5,000,000 be paid to the Cherokee Indians for their lands and possessions east of the Mississippi River." The sole consideration stated for the $5,000,000 was "their lands and possessions east of the Mississippi River." If anything else had been intended to be included, such as claims for spoliations, subsistence, removal, etc., why was it not so stated in the treaty?

It is enough to show that it is not so stated, but it is manifest that such was not the intention of the parties, for the amount of these spoliations, the expense of removal, etc., were not then known and could not have been ascertained, and, besides, they were subsisting claims upon the Government of the United States which they were bound by treaty to have paid. Not to pay them, or to pay them out of the funds of the Cherokees which had been fixed by the Senate as the value of their lands, was precisely the same thing.

The United States were bound by the treaty of 1828 to pay the expenses of the removal of all the Cherokees. This obligation was not released by the purchase of their lands at their appraised value. Would such a thing be pretended in a similar transaction between individuals? If all the Cherokees had removed before they ceded their lands, the United States were bound to pay the cost of removal. If the United States afterwards bought the lands of the Cherokees, they were bound to pay the price at which they were appraised. The first article of the treaty recites that—

"The Cherokee Nation hereby cede to the United States their lands east of the Mississippi River and hereby release their claims for spoliations of every kind, for and in consideration of $5,000,000. But as a question has arisen between the commissioners and the Cherokee people whether the Senate, when they advised that a sum not exceeding $5,000,000 be paid the Cherokee Indians for their lands and possessions east of the Mississippi River, had included or made any allowance for claims for spoliations, it is therefore agreed on the part of the United States that this question shall be submitted to the Senate for their consideration and decision, and if no allowance was made for spoliations, that then an additional sum of $300,000 be allowed for the same."

It will be seen by the above that subsistence and removal were not included in the above article, nor was any question as to either of those items then even thought of. But the only thing pretended to be charged upon this fund was spoliations.

The Senate decided that the sum of $5,000,000 was given for the lands alone, and a supplemental article giving $600,000 was added to pay for spoliations and removal, but still not including subsistence. That sum it was then thought would be sufficient to cover these charges; but it was found that it was not, and the United States, feeling that they were bound to pay these charges, again in 1838 appropriated $1,047,000 for these objects.

The Cherokee Nation does not contend that the treaty fund shall be relieved from the charge for spoliations but only from the cost of one year's subsistence and removal to the West. Both of these sums, which were added by Congress, were found inadequate to pay these various charges, and the fund of $5,000,000 has been used for that purpose and others, to its entire exhaustion, or nearly so. They ask to be relieved from the charges for removal and subsistence. It is very clear that not until after the exhaustion of the $600,000 and the $1,047,000 did the officers of the Government of the United States ever once think that the $5,000,000 was liable for these charges. Not one dollar of that fund was ever so used until then. The following communication from the then Secretary of War shows that his understanding was that this fund was not liable for these charges, or else he would not have made the requisition for the sum of $1,080,000; that is to say, $1,047,000 for these purposes and $33,000 for annuities.

Congress made the appropriation at once, which shows that the opinion of that body was the same.

If the $5,000,000 fund was liable for these charges, how could the Secretary have said that there were no funds to meet them when there was the $5,000,000 fund?

Why did Congress make this additional appropriation? The only answer which can be given is, that it was considered just under the treaty, as the Senate had said when the subject was a second time referred to that body for its decision on this specific question, that the treaty fund of $5,000,000 was not liable to be charged with these expenses. (Doc. 461, second session Twenty fifth Congress.)

DEPARTMENT OF WAR, *May 25, 1838.*

SIR: In compliance with a resolution of the House of Representatives of the 23d instant, requiring a statement of the amount that will be required for the additional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

Payment of the expenses of removing the remaining Cherokees, estimated at 15,840, at $30 per head	$475,200.00
Amount applicable to that purpose	39,300.00
Balance to be provided for	435,900.00
If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated, viz, $33.33 a head	611,105.55
Add for contingencies, under estimates, both of number to be removed and of expenses to be incurred	100,000.00
The amount of annuities, payment of which is asked for by the deputation, will be	33,330.00
	1,180,335.55

Very respectfully, your most obedient servant,

J. R. POINSETT.

Hon. J. K. POLK,
Speaker House of Representatives.

But this is not all. The question was submitted to the Secretary of War for his decision of this specific point, and he decided that these charges of subsistence and removal were not chargeable to the treaty fund but to the Government of the United States under the treaty of 1828.

Shortly after the ratification of the treaty of 1835 a question arose as to the allowance of claims for commutation of the year's subsistence, which was referred for decision to the War Department; and the decision was communicated by the Hon. C. A. Harris, Commissioner of Indian Affairs, to B. F. Curry, superintendent of the Cherokee removals, in his letter under date of November 18, 1836, in which he says: "I acknowledge the receipt of your letter of the 26th of October last, and in reply have to observe that I have taken the decision of the Secretary of War ad interim upon the claim of the Cherokees for subsistence at $33.33 each. The Secretary decides that the commutation may be paid at the rate above stated, but at the same time declares that the allowance is made under the treaty of 1828, and not in pursuance of any stipulations of the final treaty of 1835." (See Senate Doc. No. 120, p. 209, second session Twenty-fifth Congress.)

The treaty fund was never touched, nor was it ever pretended that it was liable for these charges until after the appropriations made for these specific objects had been exhausted. Now, it seems very clear that if the Government of the United States was liable for these charges when the additional sum of $600,000 was given, and then again when the further sum of $1,047,000 was given, it is equally liable for whatever may remain of these charges after both of these sums have been exhausted. The magnitude of the obligation can not be held to release the party from its fulfillment.

The thirteenth article of the treaty, which stipulates, on the part of the United States, to pay for reservations of which the Indians have been deprived, closes with the following words:

"It is expressly understood that the amount to be allowed for reservations under this article shall not be deducted out of the consideration money allowed the Cherokees for their claims for spoliations and the cession of their lands, but the same is to be paid for independently by the United States, as it is only a just fulfillment of former treaty stipulations."

Here, again, the consideration given is stated. And what is that consideration? Why, claims for spoliations and the cession of their lands—not a word said about anything else; and this because "it is only a just fulfillment of former treaty stipulations." Does not this apply equally to the payment of removal and subsistence? The Government was bound to do this by the treaty of 1828, and again by the eighth article of the treaty of 1835:

"ART. 8. The United States also agree and stipulate to remove the Cherokees to their new homes in the West, and to subsist them for one year after their arrival there, etc. Such persons and families as, in the opinion of the emigrating agent, are capable of removing and subsisting themselves shall be permitted to do so, and shall be allowed in full for all claims for the same, $20 for each member of their family, and in lieu of their one year's rations they shall be paid the sum of $33.33, if they prefer it."

What does the word "also" in the above article mean, unless it be that this removal and subsistence shall also be paid in addition to the price given for their lands? Is there any other imaginable meaning that can be given to it? The more clearly so, as the United States were bound by the subsisting and unabrogated treaty of 1828 to pay these charges.

But if neither cost of removal nor subsistence is to be paid by the United States, it is too clear to admit of contradiction that there is neither justice nor right in charging the treaty fund with more than $33.33 for subsistence nor more than $20 for removal. That was the sum which the United States were willing to allow; the sum which was fixed on as fair and proper. If the United States made it cost more, there is no justice in charging the excess to the treaty fund, but all such excess should be borne by the United States. So of the removal. The Indians were detained more than a month after they were assembled and ready to remove. This expense should also be borne by the United States, and all losses sustained on the resale of provisions which were not needed nor consumed.

As to the justice of interest the committee have no doubt. If the treaty fund had not been charged improperly, as it is now acknowledged, the money would have been paid twelve years ago. This was in no wise the fault of the Cherokees, but of the officers of the Government of the United States. The Cherokees have for all this time been deprived of the use of the money justly due them, and the United States have had the use of it for their own benefit. They have been paying interest upon money borrowed all this time, and would have had to pay that interest on a larger sum if they had paid the Cherokees what was justly due them. It is not the case of a claim of an individual, but of a people treated with as a nation; and not to have paid it was a violation of a treaty, and must be repaid now. For the claims of American citizens on Mexico and other Governments interest has been claimed by our Government and allowed. * * * The committee therefore report, and recommend the adoption of the following resolutions:

Whereas by the treaty of the 6th of August, 1846, between the United States and the Cherokee Indians, certain questions were agreed to be submitted to the decision of the Senate:

1. Resolved, That, in the opinion of the Senate, whatever balance of the fund of $5,000,000 stipulated to be paid to the Cherokee Nation by the treaty of the 29th of December, 1835, and the subsequent additions thereto, may now be ascertained to be due to the said Cherokee Nation, shall bear interest at the rate of 5 per cent per annum from the time found due until the same be paid by the United States.

2. Resolved, That the charge for one year's subsistence of the Cherokees after their arrival in the West is not a proper charge upon the fund of $5,000,000 aforesaid, but should have been paid independently of that fund by the United States.

3. Resolved, That the expense of removing the Cherokees to the West should, in like manner, have been borne by the United States and not charged to the fund of $5,000,000 aforesaid.

Commissioner Medill ignores this important report and its unanswerable argument. He quotes the unnamed commissioners whose argument we have answered, and who have been reversed by Congress in the force of their argument by the act of September 30, 1850, and February 27, 1851, wherein the very items they argued chargeable against the trust fund were refunded by Congress, to wit, in the matter of subsistence and amounts paid to Government agents.

These commissioners are also reversed by the fourth article of the treaty of 1846, which substantially agrees with the old settlers, that removal shall not be charged to the $5,000,000 fund. We regret that among the Government publications we have been unable to find the report of the commissioners quoted by Commissioner Medill.

We did find, however, a most important report of the United States commissioners appointed by the Secretary of War to inquire into the complaints and difficulties of the Cherokees, who made their report on January 17, 1845, of 143 pages, to wit: Hon. Roger Jones, Adjutant-General United States Army; Hon. Richard B. Mason, lieutenant-colonel First Dragoons; Governor Pierce M. Butler, United States agent. These commissioners make the following statement (p. 12, Senate Doc. No. 140, Twenty-eighth Congress, second session, vol. 8).

THE TREATY PARTY

COMPLAIN OF THE NONRECEIPT OF THE PER CAPITA, ETC.

The commissioners agree with the complainants that a large balance of money is due from the United States, under treaty stipulations, for per capita division among the Cherokee people.

The treaty of 1835 guarantees the payment of $5,000,000 by the United States for the Cherokee lands, subject to the deduction of moneys to be expended on certain objects enumerated in the fifteenth article, among which are removal and subsistence.

Had legislation on the subject terminated here, the United States were bound so to administer the fund that the price of the lands should not be exhausted by the expenses of removal.

The sums of $20, the commutation allowed in the eighth article for transportation, and of $33.33 for subsistence, would seem to have been the limits beyond which no further charge for these objects could properly be made upon the five millions. But the Government, in the exercise of a benevolent magnanimity, consulting not so much pecuniary considerations as the feelings and comfort of the unfortunate people, gave the removal of the mass of them into the hands of agents chosen from among themselves, instead of offering the contract for their transportation, like that of so many cattle, to the lowest bidder.

Surely, if these expenses proved greater than anticipated by the treaty it is not just to make, from the fund voted as the price of the Cherokee lands, deductions far exceeding what were contemplated when that price was fixed. Still less is it just that that portion of the Cherokee people, "the treaty party so-called" who had commuted for their removal, should have their reasonable expectations of compensation for the homes they had surrendered defeated, by the exhaustion of their consideration money in the removal of the other portion.

Under the first treaty arrangement, then, the United States would seem to owe the Cherokees all the excess that has been paid for removal and subsistence out of the five millions, over the amount that would result from allowing for each individual removed the respective sums of $20 and $33.33, stipulated in the treaty as commutation.

But there are yet to be considered certain supplementary articles to the treaty and the subsequent legislation.

The second supplementary article, concluded March 1, 1836, is to this effect: That whereas it was supposed by the Cherokee people that the Senate, in fixing the sum of five millions as the value of the Cherokee lands, did not intend to include the amount which might be required for removal, the subject was to be referred to the Senate, that, if it did not intend the five millions to include the objects specified, such further provision might be made as might appear to be just.

The third supplementary article says: "It is therefore agreed that the sum of $600,000 shall be, and the same is hereby, allowed to the Cherokee people, to include the expense of their removal;" and in the sequel concludes: "but it is expressly understood, that the subject of this article is merely referred hereby to the consid-

cration of the Senate; and if they shall approve the same, then this supplement shall remain part of the treaty."

The Senate did approve and ratify these articles, and Congress made the "further provision" called for. The conclusion seems just that the Government thereby ratified the above expressed understanding of their intentions, and debarred themselves from making any charge upon the five millions for the expenses of removal.

If this construction be correct, then are the United States bound to restore to the compensation fund, out of the whole sum paid for removal, such portion as has been charged upon the general fund; and also to restore such moneys as may have been paid out of that fund for "objects of a contingent nature" not enumerated in the treaty. Of course, what has been said in considering the complaints of the "treaty party" applies to the whole body of the emigrants. The commissioners are of opinion that the nonreceipt of this per capita is the germ of discontent—the great hindrance to the harmony and quiet of the complaining parties and of the whole people.

As a final and certain means of restoring harmony and promoting the improvement of the Cherokee people the commissioners beg leave strongly and respectfully to recommend that their authorities be heard in support of their claims on the United States, and that a new treaty be concluded on the just and liberal basis set forth and promised in the letter of His Excellency, President Tyler, September 30, 1841 (p. —). By such a measure it is believed not only will the good faith of the United States be triumphantly shown, but they will be more than repaid for this liberal policy, etc."

Commissioner Medill entirely ignores this important report, although these high commissioners were sent to make report on these very matters and did make report to the Secretary of War the very year preceding the treaty.

The only argument made by Commissioner Medill which we have not completely answered is his argument on page 7, Ex. Doc. 65, that, had the Government intended to assume the whole cost of removal, an estimate would have been made of the probable cost of removal and of the probable amount of the claims in order that the additional amount to be allowed might be made to embrace all; he says this was not done. Our answer is, first, that it was done, and second, that it was not necessary to be done.

Manifestly, the absence of an estimate demonstrates nothing. Many appropriations are made by Congress without an estimate in which Congress does intend to assume the whole cost; this has been done in thousands of cases. But in regard to the $600,000 for spoliations and removals, there was an estimate fully set forth, in Schermerhorn's proposed treaty of October 18, 1835, in the schedule thereof, to wit, for spoliations, $250,000, and $255,000 for removal. And article 3, supplement 1835, shows on its face that the $600,000 was estimated "to include the expense of their removal," etc., and leave a surplus for the education fund.

How could the $600,000 include the cost of removal unless it were estimated as more than enough?

How could there be a surplus for the education fund unless it were estimated that $600,000 was more than sufficient to pay the removal, etc?

It is notorious that the Secretary of War, May 25, 1838, made a formal estimate for a sum sufficient to pay the cost of removal of every single Cherokee (although it proved insufficient because of the terrible drought and winter which ensued).

Commissioner Medill says if the Government had intended to assume the whole cost of removal an estimate would have been made of the probable cost of removal, and as this was plainly done, according to his logic, the United States did assume the whole cost of removal.

Commissioner Medill says there was no estimate, and therefore the United States did not assume the whole cost of removal. He is wrong in his facts, and if his facts were right he would be wrong in his logic.

Yet, on his report, Mr. Albion K. Paris, Second Comptroller, and John M. McCalla, Second Auditor, make their report on the amount due the Cherokees, in which they say they take—

As a basis for our calculation the statement of amounts made by the Commissioner of Indian Affairs in his report of May 10, 1848. (Senate Ex. Doc. No. 12, Thirtieth Congress, second session.)

And thus the report of Commissioner Medill became responsible for the gross wrong perpetrated upon the Cherokees in the matter of their per capita fund due them under the treaty of 1835 and 1846, and even promised them by President Jackson and their arch enemy Schermerhorn. In contrast with the obscure, unjust, and willfully perverted report of Commissioner Medill, with its sins of commission and still greater sins of omission, we appeal to the report of the Committee on Indian Affairs of the United States Senate through Senator Jarnagin and of Adjutant-General Jones, Governor Butler, and Lieutenant-Colonel Mason, but above all to the able, exhaustive, and unanswerable report of the experts appointed by the Interior Department as authorized and directed by Congress, to bring this matter to a settlement which Attorney General Shields, in his report submitted to Congress, declared should be final. This report from pages 76 to 88, in Senate Doc. No. 215, Fifty-sixth Congress, first session, we make as our concluding answer to every objection which could be suggested adverse to our claim. Earnestly praying and respectfully insisting upon a prompt report in our favor and the settlement of our just claim, we have the honor to be,

Your most obedient and humble servants,

THE EASTERN OR EMIGRANT CHEROKEES
(SO CALLED) OF THE INDIAN TERRITORY.
DAVID MUSKRAT,
DANIEL GRITTS,
FRANK J. BOUDINOT.
Executive Committee.

ROBERT L. OWEN, *Of Counsel.*

EXHIBITS.

THE CHEROKEE NATION OF INDIANS.

A NARRATIVE OF THEIR OFFICIAL RELATIONS WITH THE COLONIAL AND FEDERAL GOVERNMENTS.

BY CHAS. C. ROYCE.

1835.

(Pages 270, 277.)

The memorial of the Cherokee Nation respectfully showeth, that they approach your honorable bodies as the representatives of the people of the United States, intrusted by them under the Constitution with the exercise of their sovereign power, to ask for protection of the rights of your memorialists and redress of their grievances.

They respectfully represent that their rights, being stipulated by numerous solemn treaties, which guaranteed to them protection, and guarded, as they supposed, by laws enacted by Congress, they had hoped that the approach of danger would be prevented by the interposition of the power of the Executive, charged with the execution of treaties and laws, and that when their rights should come in question they would be finally and authoritatively decided by the judiciary, whose decrees it would be the duty of the Executive to see carried into effect. For many years these their just hopes were not disappointed.

The public faith of the United States, solemnly pledged to them, was duly kept in form and substance. Happy under the parental guardianship of the United States, they applied themselves assiduously and successfully to learn the lessons of civiliza-

tion and peace, which, in the prosecution of a humane and Christian policy, the United States caused to be taught them. Of the advances they have made under the influence of this benevolent system they might a few years ago have been tempted to speak with pride and satisfaction, and with grateful hearts to those who have been their instructors. They could have pointed with pleasure to the houses they had built, the improvements they had made, the fields they were cultivating; they could have exhibited their domestic establishments and shown how, from wandering in the forests, many of them had become the heads of families, with fixed habitations, each the center of a domestic circle like that which forms the happiness of civilized man.

They could have shown, too, how the arts of industry, human knowledge, and letters had been introduced among them, and how the highest of all the knowledge had come to bless them, teaching them to know and to worship the Christian God, bowing down to him at the same seasons and in the same spirit with millions of His creatures who inhabit Christendom, and with them embracing the hopes and promises of the gospel. But now each of these blessings has been made to them an instrument of the keenest torture. Cupidity has fastened its eye upon their lands and upon their homes, and is seeking by force, and by every variety of oppression and wrong, to expel them from their lands and their homes, and to tear them from all that has become endeared to them. Of what they have already suffered it is impossible for them to give the details, as they would make a history. Of what they are menaced with by unlawful power every creature of the United States who reads the public journals is aware.

In this, their distress, they have appealed to the judiciary of the United States, where their rights have been solemnly established. They have appealed to the Executive of the United States to protect these rights according to the obligations of treaties and the injunctions of the laws. But this appeal to the Executive has been made in vain. In the hope that by yielding something of their clear rights they might succeed in obtaining security for the remainder, they have lately opened a correspondence with the Executive, offering to make a considerable cession from what has been reserved to them by solemn treaties, only upon condition that they might be protected in the part not ceded; but their earnest supplication has been unheeded, and the only answer they can get informs them, in substance, that they must be left to their fate or renounce the whole. What that fate is to be, unhappily, is too plain.

The State of Georgia has assumed jurisdiction over them, has invaded their territory, has claimed the right to dispose of their lands, and has actually proceeded to dispose of them, reserving only a small portion to individuals, and even these portions are threatened and will no doubt soon be taken from them. Thus the nation is stripped of its territory and individuals of their property without the least color of right and in open violation of the guaranty of treaties. At the same time the Cherokees, deprived of the protection of their own government and laws, are left without the protection of any other laws; outlawed, as it were, and exposed to indignities, imprisonment, persecution, and even to death, though they have committed no offense whatever save and except that of seeking to enjoy what belongs to them and refusing to yield it up to those who have no pretense of title to it.

Of the acts of the legislature of Georgia your memorialist will endeavor to furnish copies to your honorable bodies, and of the doings of the individuals they will furnish evidence if required. And your memorialists further respectfully represent that the Executive of the United States has not only refused to protect your memorialists against the wrongs they have suffered and are still suffering at the hands of unjust cupidity, but has done much more. It is but too plain that for several years past the power of the Executive has been exerted on the side of their oppressors and is cooperating with them in the work of destruction. Of two particulars in the conduct of the Executive your memorialists would make mention, not merely as matters of evidence, but as specific subjects of complaint in addition to the more general ones already stated.

The first of these is the mode adopted to oppress and injure your memorialists under color of enrollments for emigration. Unfit persons are introduced as agents, acts are practiced by them that are unjust, unworthy, and demoralizing, and have no object but to force your memorialists to yield and abandon their rights by making their lives intolerably wretched. They forbear to go into particulars, which nevertheless they are prepared, at a proper time, to exhibit.

The other is calculated also to weaken and distress your memorialists, and is essentially unjust. Heretofore, until within the last four years, the money appropriated by Congress for annuities has been paid to the nation, by whom it was distributed and used for the benefit of the nation. And this method of payment was not only sanctioned by the usage of the Government of the United States, but was acceptable to the Cherokees.

Yet, without any cause known to your memorialists and contrary to their just expectations, the payment has been withheld for the period just mentioned, on the

ground, then for the first time assumed, that the annuities were to be paid, not as hitherto, to the nation, but to the individual Cherokees, each his own small fraction, dividing the whole according to the numbers of the nation. The fact is that for the last four years the annuities have not been paid at all.

The distribution in this new way was impracticable if the Cherokees had been willing thus to receive it, but they were not willing; they have refused and the annuities have remained unpaid. Your memorialists forbear to advert to the motives of such conduct, leaving them to be considered and appreciated by Congress. All they will say is that it has coincided with other measures adopted to reduce them to poverty and despair and to extort from their wretchedness a concession of their guaranteed rights. Having failed in their efforts to obtain relief elsewhere, your memorialists now appeal to Congress, and respectfully pray that your honorable bodies will look into their whole case, and that such measures may be adopted as will give them redress and security.

(Page 284.)

REPORT OF MAJOR DAVIS (MARCH 5, 1836).

I conceive that my duty to the President, to yourself, and to my country reluctantly compels me to make a statement of facts in relation to a meeting of a small number of Cherokees at New Echota last December, who were met by Mr. Schermerhorn, and articles of a general treaty entered into between them for the whole Cherokee Nation. * * * I should not interpose in the matter at all, but I discover that you do not receive impartial information on the subject; that you have to depend upon the ex parte, partial, and interested reports of a person who will not give you the truth. I will not be silent when I see that you are about to be imposed on by a gross and base betrayal of the high trust reposed in Rev. J. F. Schermerhorn by you. His conduct and course of policy was a series of blunders from first to last. * * * It has been wholly of a partisan character.

Sir, that paper * * * called a treaty is no treaty at all, because not sanctioned by the great body of the Cherokees and made without their participation or assent. I solemnly declare to you that upon its reference to the Cherokee people it would be instantly rejected by nine-tenths of them and I believe by nineteen-twentieths of them. There were not present at the conclusion of the treaty more than 100 Cherokee voters, and not more than 300 including women and children, although the weather was everything that could be desired. The Indians had long been notified of the meeting, and blankets were promised to all who would come and vote for the treaty. The most cunning and artful means were resorted to to conceal the paucity of numbers present at the treaty. No enumeration of them was made by Schermerhorn. The business of making the treaty was transacted with a committee appointed by the Indians present, so as not to expose their numbers.

The power of attorney under which the committee acted was signed only by the president and secretary of the meeting, so as not to disclose their weakness. * * * Mr. Schermerhorn's apparent design was to conceal the real number present, and to impose on the public and the Government upon this point. The delegation taken to Washington by Mr. Schermerhorn had no more authority to make a treaty than any other dozen Cherokees accidentally picked up for that purpose. I now warn you and the President that, if this paper of Schermerhorn's called a treaty is sent to the Senate and ratified, you will bring trouble upon the Government and eventually destroy this (the Cherokee) nation. The Cherokees are a peaceable, harmless people, but you may drive them to desperation, and this treaty can not be carried into effect but by the strong arm of force.

(Page 286.)

SPEECH OF GEN. R. G. DUNLAP (SEPTEMBER, 1836).

I forthwith visited all the posts within the first three States and gave the Cherokees (the whites needed none) all the protection in my power. * * * My course has excited the hatred of a few of the lawless rabble in Georgia, who have long played the part of unfeeling petty tyrants, and that to the disgrace of the proud character of gallant soldiers and good citizens. I had determined that I would never dishonor the Tennessee arms in a servile service by aiding to carry into execution at the point of the bayonet a treaty made by a lean minority against the will and authority of the Cherokee people. * * * I soon discovered that the Indians had not the most distant thought of war with the United States, notwithstanding the common rights of humanity and justice had been denied them.

(Page 286.)

REPORT OF GEN. JOHN E. WOOL (FEBRUARY 18, 1837).

I called them (the Cherokees) together and made a short speech. It is, however, vain to talk to a people almost universally opposed to the treaty and who maintain that they never made such a treaty. So determined are they in their opposition

that not one of all those who were present and voted at the council held but a day or two since, however poor or destitute, would receive either rations or clothing from the United States lest they might compromise themselves in regard to the treaty. These same people, as well as those in the mountains of North Carolina, during the summer past preferred living upon the roots and sap of trees rather than receive provisions from the United States, and thousands, as I have been informed, had no other food for weeks.

Four months later General Wool said (p. 286): Had Curry lived he would assuredly have been killed by the Indians. It is a truth that you have not a single agent, high or low, that has the slightest moral control over the Indians. It would be wise if persons appointed to civil stations in the nation could be taken from among those who have had nothing to do with making the late treaty.

(Page 290:)

GOVERNOR GILMER, OF GEORGIA (MAY, 1838).

* * * I can give it no sanction whatever. The proposal could not be carried into effect but in violation of the rights of this State. * * * It is necessary that I should know whether the President intends, by the instructions to General Scott, to require that the Indians shall be maintained in their occupancy by an armed force in opposition to the rights of the owners of the soil. If such be the intention, a direct collision between the authorities of the State and the General Government must ensue. My duty will require that I shall prevent any interference whatever by the troops with the rights of the State and its citizens. I shall not fail to perform it.

HOUSE EX. DOC. NO. 453, VOL. II, PART 1, 1837–38, TWENTY-FIFTH CONGRESS, SECOND SESSION.

(April 6, 1838:)

Maj. Gen. Alex. McComb, commander in chief, directs Maj. Gen. W. Scott to prepare to remove Cherokees by military force, as "it is apprehended that the mass of the nation, under some delusion, does not intend to remove to the country provided for them under the stipulations of the treaty entered into with them on the 29th of December, 1835."

(May 10, 1838:)

General Scott (p. 11) issues an address to the Cherokees as follows:

Major-General Scott, of the United States Army, sends to the Cherokee people remaining in North Carolina, Georgia, Tennessee, and Alabama this

ADDRESS.

CHEROKEES: The President of the United States has sent me with a powerful army to cause you, in obedience to the treaty of 1835, to join that part of your people who are already established in prosperity on the other side of the Mississippi. Unhappily, the two years which were allowed for the purpose you have suffered to pass away without following, and without making any preparation to follow, and now, or by the time that this solemn address shall reach your distant settlements, the emigration must be commenced in haste, but I hope without disorder. I have no power, by granting a further delay, to correct the error that you have committed. The full moon of May is already on the wane, and before another shall have passed away every Cherokee man, woman, and child in those States must be in motion to join their brethren in the far West.

My friends, this is no sudden determination on the part of the President, whom you and I must now obey. By the treaty the emigration was to have been completed on or before the 23d of this month, and the President has constantly kept you warned, during the two years allowed, through all his officers and agents in this country, that the treaty would be enforced.

I am come to carry out that determination. My troops already occupy many positions in the country that you are to abandon, and thousands and thousands are approaching from every quarter to render resistance and escape alike hopeless. All those troops, regular and militia, are your friends. Receive them and confide in them as such. Obey them when they tell you that you can remain no longer in this country. Soldiers are as kind hearted as brave, and the desire of every one of us is to execute our painful duty in mercy. We are commanded by the President to act toward you in that spirit, and such is also the wish of the whole people of America.

Chiefs, headmen, and warriors, will you, then, by resistance compel us to resort to arms? God forbid. Or will you by flight seek to hide yourselves in mountains and forests, and thus oblige us to hunt you down? Remember that in pursuit it

may be impossible to avoid conflicts. The blood of the white man or the blood of the red man may be spilt, and if spilt, however accidentally, it may be impossible for the discreet and humane among you or among us to prevent a general war and carnage. Think of this, my Cherokee brethren. I am an old warrior and have been present at many a scene of slaughter; but spare me, I beseech you, the horror of witnessing the destruction of the Cherokees.

Do not, I invite you, even wait for the close approach of the troops, but make such preparations for emigration as you can, and hasten to this place, to Ross's Landing or to Gunter's Landing, where you all will be received in kindness by officers selected for the purpose. You will find food for all and clothing for the destitute at either of these places, and thence at your ease and in comfort be transported to your new homes according to the terms of the treaty.

This is the address of a warrior to warriors. May his entreaties be kindly received, and may the God of both prosper the Americans and Cherokees and preserve them long in peace and friendship with each other.

WINFIELD SCOTT.

CHEROKEE AGENCY, *May 10, 1838.*

(May 17, 1838:)

General Scott (p. 8) issues General Order, No. 25, announcing to the troops "that, with them, he has been charged by the President to cause the Cherokee Indians yet remaining in North Carolina, Georgia, Tennessee, and Alabama to remove to the West, according to the terms of the treaty of 1835;" announces his staff, divides the country into districts to be commanded by the officers severally named, and arranges plans of operation, etc.

(June 7, 1838:)

General Scott (p. 18) acknowledges to Hon. J. R. Poinsett, Secretary of War, the receipt of his letter of 23d of May, "inclosing a copy of the proposals made by the Department to the Cherokee delegation, of a date five days earlier," and says, among other things:

"The peace, nay, the lives of the Indians require that they should be immediately removed from Alabama, as well as from Georgia, Tennessee, and North Carolina. Accordingly I am glad to find myself instructed to continue my operations, although I should be extremely delighted if something more could be done to soothe the feelings of the Cherokees and to compensate them in money, at least, in part discharge of that great debt of justice due from the United States."

General Scott further says:

"There is remaining in the Cherokee country no authority or no set of agents to sign any stipulation or contract in the least degree binding on the Indians. The whole political power of the tribe is, at least for the time, in the hands of the delegation at Washington; and should that delegation, or, rather, Mr. John Ross (whom all obey), ever present himself to me, I do not see that I should have, under the proposals, power to do more than to take the business of emigrating the Indians out of the hands of the present superintendent and to put it into his. This would, no doubt, be highly agreeable to the Ross party, and in the same degree, without many guards, offensive if not fatal to the opposite party—a mere fraction, but consisting of individuals of great wealth and respectability."

(June 15:)

General Scott reports (p. 22) to Secretary of War:

"A few families and individuals have, however, it is known, taken refuge in the mountain parts of three districts. With such exceptions Georgia may be said to be cleared of Cherokees, and in three or five days as much will have been done in Tennessee, North Carolina, and Alabama."

(June 18:)

General Scott reports (p. 26):

"I have, with the concurrence of the superintendent of Cherokee emigration and after the fullest inquiries, determined to suspend further emigration until the 1st of September next. Not only the comfort, but the safety, of the Indians in reference to the advanced season has forced this decision upon me. In the meantime I propose to hold the prisoners and voluntary emigrants in convenient camps, guarded by the regular troops, around the two great emigrating depots."

CHEROKEE PETITIONS.

JUNE 9, 1838.

We have heard with intense emotions your address of the 10th of May. We have, with more or less distinctness, heard rumors of subsequent orders and of their execution. We have considered them with all the seriousness and care of which we were

capable and which their portentous character demands. A most formidable military force is arrayed against us for declining to comply with the requirements of the instrument of New Echota. It this be a crime, sir, it has been committed in the honesty of our hearts and in pursuance of the principles of justice, in which we have been instructed by your own most honored chiefs. But, sir, we do not appear before you in this our humble address to discuss the merits of that compact, which, even under the most appalling circumstances, we dare not in conscience recognize in any other character than that of fraud upon the United States as well as upon the Cherokees. We approach you, sir, in the character of individuals of a besieged nation. We offer no resistance to your troops. We seek not to hide ourselves by flight. We are at all times accessible, as you have had ample proof. We are entirely at your mercy. We are altogether in your hands. But, sir, bad as our condition is, we can not but rejoice that we have fallen into the hands of a commander who can appreciate our feelings as lovers of our country and lovers of right. We venerate the virtues of the patriot chieftain, whose life has been hazarded in defense of his country's rights; who has braved the terrors of the battlefield in defense of the very principles to which we humbly presume to cling. We respect the humanity which breathes through your orders, the care for our comfort which they evince, and the deprecation of destruction of the Cherokees which they express.

In this dark hour it is consoling to be told that our father, the President, has commanded the duties with which you are charged to be executed in mercy and that "such is the wish of the whole American people." It is consoling also to perceive that the same sentiment is expressed in the President's communication to the governors concerned and in the opinion of the Secrerary of War, approved by the President and by him laid before Congress, as well as in the honorable Secretary's letter to yourself of the 23d of May.

Indulging also the assurance of your own good feeling toward our people, as well from your communications as from the known magnanimity and generosity of your character, we can not but entertain the hope that this our humble address will meet with your favorable regard, especially as our requests are in perfect conformity with the expressed sentiments of high functionaries of Government and the whole American people.

Our request, sir, is this: That the capture and emigration of our people may not be executed with so much haste at the present season of the year, as threatening an amount of suffering, disease, and death, so frightful as to excite forebodings little short of the extermination of our whole race. The journey to Arkansas has often been performed from this country. Our people are well acquainted with the results which have uniformly attended it.

Under favorable conditions, in healthful seasons, with willing emigrants, and in numbers so small as to admit of their being immediately accommodated by their friends with shelter from worst effects of the insalubrity of the climate, an alarming amount of sickness and death has been the constant attendant. And what can be expected if the remainder of the 16,000 or 17,000 souls be captured in one day and sent off at once in this sickly season? In complying with this our most importunate request we can conceive no disadvantage which it would occasion to the service with which you are charged, as the business of capturing our whole people can be effected any day you may be pleased to order it. With regard to those already made prisoners, our request is that they may be indulged with the privilege of a parole until the season will admit of their emigrating with greater security to their health. With regard to the faithful observance of the parole, we are willing to pledge ourselves to guarantee their punctual appearance at the time you may prescribe, and if you should think the guarantee of the national council necessary, we hesitate not to say that it shall be given as early as a session can be convened.

We ask for no delay that can in the least interfere with the measure of government as expressed in the documents referred to. It is very evident, sir, that the emigrants, if taken off at this time, will arrive there at the sickly season. They will have no shelter, no furniture, few tools, and no health to use them so as to prepare for their own comfort and that of their families, so they will be exposed throughout the whole season to the ravages of that sickly climate; whereas in the fall they would arrive at the commencement of the healthful season, which would afford them an opportunity to provide for the comfort of themselves and families. To be taken by thousands from this healthful country and set down on the banks of Arkansas in the month of July, or to be detained on that sickly stream on account of low waters, far short of the place of destination, is a thought at which our hearts sicken; our wives and children, our aged and infirm, and our strongest men, laid prostrate together, is a consideration which breaks our hearts, which unmans our firmest nerve.

In conclusion, sir, permit us to appeal to your magnanimity, to your humanity, to your compassion; the lives of our whole nation are at your disposal: at your word thousands of people may die and their names be forgotten; at your word they may live; and by the favor of Providence their posterity may bless your name and trans-

mit in gratitude its remembrance to the latest generation. Assuredly, sir, this is no common occurrence. The annals of time exhibit few instances in which an individual is placed in a condition to confer benefits lasting and substantial on a great portion of our race.

We add no more. With the most solicitous anxiety we await the result of this application. Your favorable attention will cheer our hearts; your rejection of our suit will seal our despair.

With the most profound respect, we are, sir, your humble servants,

GEORGE LOWRY.
THOMAS FOREMAN.
(And Others.)

Major-General SCOTT, U. S. A.,
Commanding Cherokee Nation.

P. S.—A report has reached us that several hundred of our people now at or near Ross Landing are to be sent off in a few days. Pardon us, sir, if we can not conceal our anxiety on their account. We feel for them as friends condemned to die.

CHEROKEE AGENCY, *June 11, 1838.*

SIR: We, your humble petitioners (and who, before this may reach your eyes will, no doubt, most of us, be your prisoners), ask permission, very respectfully, to represent:

That the orders of our great ally and protector, the President of the United States, as contained in your address of the 10th of May, has filled our mind with astonishment and dismay. We have relied with unwavering confidence on the good faith of the United States. When told by the makers of the unjust paper of New Echota that we were deceiving ourselves by doing so, we could not believe them; and we were fully persuaded that all our difficulties originated in the corrupt principles and practices of the promoters and makers of that instrument on both sides, and that nothing but a fair representation of the case was required to insure to us ample justice. We solicited investigation with all earnestness. A special agent from the President came to our last general council for that purpose In all frankness and friendship he was hailed and honored at our council ground. Nothing was concealed from him. We anticipated a fair report to the President and an immediate abrogation of that perfidious instrument.

That report has lately been published. We have read it with unmingled satisfaction. It is the truth, and the maker of it will long be remembered with gratitude and honor by the Cherokee people.

Why the execution of that compact should be urged with such precipitancy, in the face of that illustration of its character, we can not conceive, nor is this the place to discuss that point. Our present object is to address yourself, sir, as having the unquestioned control of our destinies, so far as physical force is concerned; to propitiate your compassion in the exercise of your power, so as to mitigate horrors which must result from carrying into effect the course intimated in a part of your address, which says, "that before another moon shall have passed away every Cherokee, man, woman, and child, must be in motion to join their brethren in the far West." This, sir, would bring us to Arkansas just at the beginning of the sickly season; and it can not but be hazardous in the extreme, and more fearfully so for constitutions habituated to this healthful atmosphere, to crowd together, at so unfavorable a season, a whole nation of people, with all the conditions of age and infirmity and sex and helplessness, in all the varieties which such a concourse must comprise, and without houses, to be exposed to the deleterious fogs and winds and heats, most fatal to health. The inevitable consequence of such a course must be most appalling ravage of disease and death. This measure, sir, we most solemnly and most earnestly deprecate. Our position is urgent, sir; but we bespeak your patience to suffer us to urge the most pressing considerations of humanity and of mercy. We urge it, sir, by the sentiments expressed by yourself, that "it is the desire of everyone of us to execute this painful duty in mercy." "We are commanded," you say, "by the President to act toward you in that spirit, and such also is the wish of the whole of the American people." If it be painful to you, sir, to contemplate the work, what must be the feelings of the Cherokees, who are to be the subjects of the disaster and ruin which must ensue? For, sir, if we are hurried off at this season, we must, unavoidably, fall a prey to that cruel climate, and our complaints will be forever silenced.

Do not upbraid us, sir, with neglecting to make preparation and with wasting the time allowed for that purpose. The President can not do so with Colonel Mason's report in his hands. The President has made no treaty with us on the basis of removal, although we have, by our delegation, asked him to do so. We can not but feel aggrieved to be charged with neglect and unfaithfulness by a power to

which we dare not reply. Your age and experience can appreciate this our feeling of mortification and feebleness.

You have us completely in your power, sir. On this point there is no controversy. Our whole people are your prisoners, or expect to be so in a few days; therefore, whatever you may do to alleviate our distresses must be viewed by us as emanating from your own magnanimity and the feeling of humanity, and must be so viewed by the intelligent and virtuous of the United States and of other nations, who will wear for you a wreath of fairer laurels than can be gathered by the destruction of the unoffending, unarmed, and unwarlike Cherokees.

Pardon, sir, the freedom with which we have urged our anxious plea. Our case is pressing and will admit of no delay. We ask most respectfully and most humbly that we may not be sent to the West till fall, when the prospect of health will be more favorable. Our humble petition is before you; we hope for a favorable answer.

GEORGE LOWRY.
L. W. HILDERBRAND.
(And Others.)

Major-General SCOTT, U. S. A.,
Cherokee Country.

HEADQUARTERS EASTERN DIVISION,
Cherokee Agency, June 19, 1838.

GENTLEMEN: I have received two memorials numerously signed by yourselves and other Cherokees, dated, respectively, the 9th and 11th of this month, praying:

1. That the collection of the Cherokees by the troops for emigration may be delayed or relaxed, and

2. That the families and individuals so collected, or who have voluntarily come in, may not be sent off to the west of the Mississippi before the next autumn.

Under my instructions from the President no delay or relaxation can be permitted in the collection of the whole Cherokee people east preparatory to their early emigration west.

In respect to the second proposition I am disposed to grant indulgence, if the chiefs and headmen present will give me a written pledge for themselves and the other chiefs and headmen absent to the following conditions:

1. That each will discountenance and suppress among the Cherokee people the idea that there is the slightest intention on the part of the United States to suspend the emigration beyond the 1st of September next, for in all that month it is my solemn expectation and purpose to put in motion from the emigrating depots every Cherokee east for the Cherokee country west of the Mississippi.

2. That the chiefs and headmen will, in good faith, exert their authority to prevent their people from escaping or straggling from the camps which may be assigned, or leaving the latter beyond the limits prescribed, except on special written permissions, to be signed by the nearest commander of troops or by the superintendent of Cherokee emigration.

3. That the same authority will be employed to preserve good order among the Indians in the respective camps, to prevent drinking, to prevent any injury to the citizens or their property, and to aid the emigrating officers and agents in obtaining an exact list or register, by names, families, ages and sexes, of all the Cherokees who are to be emigrated.

Expecting a prompt acceptance of the foregoing conditions, I remain,
Your friend,

WINFIELD SCOTT.

Messrs. G. LOWRY, T. FOREMAN, and Others.

CHEROKEE AGENCY, *June 19, 1838.*

SIR: We have the honor of acknowledging the reception of your communication of the present instant in answer to our petitions of the 9th and 11th of the present month. Sir, we shall ever feel under much obligation to you for the indulgence which you seem disposed to allow us upon the conditions specified in your communication. Without specifying particulars we respectfully accept these conditions, and hereby pledge ourselves to use our best efforts to have them strictly complied with.

We have, sir, the honor to be, your friends,

GEORGE LOWRY.
LEWIS ROSS.
(And Others.)

Major-General SCOTT, U. S. A.,
Commanding.

EMIGRATION OF INDIANS.

RESOLUTION OF THE CHEROKEE COUNCIL.

Whereas the whole population of the Cherokeee Nation have been captured by the order of the President of the United States in order to their transportation from the land of their fathers to the west of the river Mississippi, in execution of the alleged stipulations of an instrument purporting to be a treaty made at New Echota in 1835, but against the validity of which the Cherokees have always earnestly protested;

And whereas Maj. Gen. Winfield Scott, having the execution of this order in charge, had actually commenced their transportation, but from motives of humanity was pleased kindly to entertain the memorials presented to him by a part of our people on behalf of the whole, and in compliance with their prayers magnanimously agreed to suspend their further transportation until the 1st of September;

And whereas our delegation has just returned from Washington City, and having important suggestions to make to the commanding general, under a special understanding with the honorable Secretary of War, in reference to the removal of the nation to the West, have submitted the matter to this council for advice:

Resolved, therefore, by the national committee and council and people of the Cherokee Nation in general council assembled, That it is the decided sense and desire of this general council that the whole business of the emigration of our people shall be undertaken by the nation, and the delegation are hereby advised to negotiate the necessary arrangements with the commanding general for that purpose.

RICHARD TAYLOR,
President of the National Committee.
E. HICKS,
(And Others.)

AQUOHEE CAMP, *July 21, 1838.*

No. 1.

PROPOSITION OF CHEROKEE DELEGATION TO GENERAL SCOTT.

AMOKE DISTRICT, *Aquohee Camp, July 23, 1838.*

SIR: In respectfully presenting for your consideration the following suggestions in relation to the removal of the Cherokee people to the West it may be proper very briefly to advert to certain facts which have an important bearing on the subject.

It is known to you, sir, that the undersigned, the delegates of the Cherokee Nation, submitted to the honorable the Secretary of War the project of a treaty on the basis of a removal of the Cherokee Nation from "all the lands now occupied by them eastward of the Mississippi," and on terms the most of which the honorable Secretary expresses himself as "not willing to grant." The present condition of the Cherokee people is such that all dispute as to the time of emigration is set at rest. Being already severed from their homes and their property—their persons being under the absolute control of the commanding general—and being altogether dependent on the benevolence and humanity of that high officer for the suspension of their transportation to the West at a season and under circumstances in which sickness and death were to be apprehended to an alarming extent, all inducements to prolong their stay in this country are taken away, and however strong their attachment to the homes of their fathers may be, their interest and their wishes now are to depart as early as may be consistent with their safety, which will appear from the following extract from their proceedings on the subject:

"*Resolved by the national committee and council and people of the Cherokee Nation in general council assembled,* That it is the decided sense and desire of this general council that the whole business of the emigration of our people shall be undertaken by the nation; and the delegation are hereby advised to negotiate the necessary arrangements with the commanding general for that purpose."

In conformity, therefore, with the wishes of our people, and with the fact that the delegation has been referred by the honorable the Secretary of War to conclude the negotiation in relation to emigration with the commanding general in the Cherokee country, we beg leave, therefore, very respectfully to propose—

That the Cherokee Nation will undertake the whole business of removing their people to the west of the river Mississippi;

That the emigration shall commence at the time stipulated in a pledge given to you by our people, as a condition of the suspension of their transportation until the

sickly season should pass away, unless prevented by some cause which shall appear reasonable to yourself;

That the per capita expense of removal be based on the calculation of one wagon and team and six riding horses required for fifteen persons;

That the Cherokees shall have the selection of physicians and such other persons as may be required for the safe and comfortable conducting of the several detachments to the place of destination—their compensation to be paid by the United States.

We have the honor to be, your obedient servants,

JOHN ROSS.
ELIJAH HICKS.
(And Others.)

Maj. Gen. WINFIELD SCOTT, U. S. A.,
Commanding, etc.

No. 2.

HEADQUARTERS EASTERN DIVISION,
Cherokee Agency, July 25, 1838.

GENTLEMEN: I have received your letter submitting certain proposals, dated on the 23d instant.

On the part of the United States I am ready to place the whole business of completing the emigration of the Cherokee people remaining east of the Mississippi (with an exception to be mentioned; see the exception and note upon it below) to their new homes west of that river in the hands of such functionaries of the Eastern Cherokees as may exhibit to me from the same due authority to undertake and carry through the emigration, on the following conditions:

1. That the said functionaries and their people shall continue to observe and execute, in good faith, the promises given to me in writing by certain chiefs and head men, for themselves and people, present and absent, on the 19th ultimo.

2. That the said functionaries shall send intelligent Indian runners, to be furnished with written permission, signed by the commanding general, in search of, and to cause to be brought into the emigration, all Indian families and individuals who may remain out, and who are not citizens of the United States, or who have not received permission to remain in the States for the purpose of becoming denizens of the same.

3. That with the exception of such Indians as are or who may have obtained permission to remain in order to become citizens or denizens of the United States or of the States, also with the exception of such Indian families and individuals as may be permitted by the commanding general to emigrate themselves,* the said Cherokee functionaries shall cause all their people now remaining East, and who may at the time be able to travel, including fugitive Creeks among them, to be put in motion, in convenient detachments, either by land or water, and transported without unnecessary delays on the routes, to the Cherokee country west of the Mississippi, beginning the movement as early as the 1st of September next, and continuing to send off parties at intervals not exceeding three days, so that all the emigrants able to travel within that time shall be in motion for the West by the —— day of the ensuing month (October).

Such Indians as within that time may not be able to travel by land shall, if the rivers be not up, be permitted to remain until the next rise of waters, and in the meantime have as attendants a small number of their families or friends.

The foregoing conditions being agreed to, the United States, through me, are willing to stipulate to pay over to the Cherokee functionaries, from time to time, such portions of the moneys *appropriated for the emigration* as may seem reasonable to prepare for and carry it out.

I remain, gentlemen, etc.,

WINFIELD SCOTT.

Messrs. JOHN ROSS, E. HICKS, J. BROWN, E. GUNTER, S. GUNTER, SITUAKEE, WHITE PATH, R. TAYLOR, etc.

*Note for the Secretary of War (added):
This exception is intended for the benefit of such of the treaty-making party as may not choose to remove under the directions of Mr. Ross and his associates.

WINFIELD SCOTT.

RESOLUTION OF THE CHEROKEE COUNCIL.

Resolved by the committee and council and people in general council assembled, That Messrs. John Ross, Richard Taylor, Samuel Gunter, Edward Gunter, James Brown, Elijah Hicks, Sitiwagy, and White Path be, and they are hereby, authorized and fully empowered, on the part of the Cherokee Nation, to make and enter into any and all such arrangements with Maj. Gen. Winfield Scott, on the part of the United States, which they may deem necessary and proper, for effecting the entire removal of the Cherokee people from the east to the west of the Mississippi River; and also to enter into such further arrangements with the commanding general in the relation to the payment of such sums of money by the United States as may be necessary for the removal and subsistence of all the Cherokee people. And they are hereby further authorized and empowered to make any such selections of persons as they may deem necessary to aid and assist in the said removal of the Cherokees to the western country.

RICHARD TAYLOR,
President of the National Committee.
JAMES WOFFORD,
JOHN F. BALDRIDGE,
(And Others.)

AQUOHEE CAMP, *July 26, 1838.*

No. 3.

CHEROKEE AGENCY, EAST, *July 27, 1838.*

SIR: Your letter addressed to the undersigned on the 25th instant has been considered by the council and people assembled. *The accompanying resolution* confers the authority upon the late delegation to Washington City to close with you the necessary arrangements for the entire removal and subsistence of the Cherokees. We are now prepared to discharge the duties devolving upon us in relation to this matter.

To the conditions mentioned in your letter, upon which you are willing to place the whole business of managing the emigration in our hands, we are not disposed to object, but are ready and willing to accede to them with, however, this further understanding, that we may be allowed the two entire months of September and October to get all our people in motion for the West, and that we shall not be required positively to send off a detachment "at intervals not exceeding three days." In the commencement, the weather will be very warm, and before the arrival west of the last parties the winter will have commenced its rigor, and we would prefer some discretion as to the time and arrangement in dispatching detachments, especially as the time for the moving of the last will be fixed.

We have the honor to be, sir, most respectfully, your obedient servants,

JOHN ROSS,
EDWARD GUNTER,
(And Others.)

No. 4.

HEADQUARTERS EASTERN DIVISION,
Cherokee Agency, July 28, 1838.

GENTLEMEN: Your note of yesterday, in reply to mine of the 25th instant, is before me, as also the paper of the 26th, conferring upon you full powers to enter into arrangements with me for carrying on and completing the emigration of the Cherokee people remaining East to the west of the Mississippi.

The latter document is sufficient; and in reply to your note I will so far yield to your wishes as to say that the emigration must recommence on or before the 1st day of the ensuing September and be continued at short intervals, so as to be completed on or before the 20th of the following month, with the exception of such sick and superannuated Cherokees as may not be able to travel by land, and their necessary attendants. Should the rivers between this and your new country west be not navigable for steamboats in the meantime, I have further no objection to give to the more respectable heads of families, whose names may be presented to me for the purpose, special permissions to remain and to remove themselves and families on the first sufficient rise of those rivers, although such rise may not happen until after the 20th of October next.

The moneys which from time to time may be deemed necessary to prepare for and carry on the emigration you will please make estimates for, addressed to me, specifying the immediate objects, and if the estimates shall appear reasonable they shall be promptly complied with.

I remain, gentlemen, yours, with respect,

WINFIELD SCOTT.

Messrs. J. ROSS, E. GUNTER, E. HICKS, S. GUNTER, and Others,
Agents of the Cherokee Nation.

No. 5.

CHEROKEE AGENCY, EAST, *July 31, 1838.*

SIR: You have herewith the estimate of the expenses of each detachment of (1,000) Cherokees to be removed by land, as estimated for by this committee, and which is respectfully submitted for your consideration and approval.

It is desirable that immediate arrangements be entered upon for the *purchase* of wagons, etc., and the organization of detachments, as well as the timely establishment of depots for subsistence on the whole route. Your approval of the estimate being known, and the basis established to regulate expenditures, the immediate amount required will be specified.

With much respect, we have the honor to be, your obedient servants,

JOHN ROSS.
EDWARD GUNTER.
(And Others).

Maj. Gen. WINFIELD SCOTT, U. S. A.,
Commanding.

Estimate for the emigration of a party of 1,000 Cherokees to their country west of the Mississippi; distance, 800 miles; eighty days going.

50 wagons and teams, 20 persons to each wagon, at a daily expense of $350, including forage	$28,000
Returning, $7 each day for every 20 miles	14,000
250 extra horses, at 40 cents each per day	8,000
Ferriages, etc	1,000
80,000 rations, at 16 cents	12,800
Conductor, at $5 per day	400
Assistant, at $3 per day	240
Physician, at $5 per day	400
Returning, $15 for every hundred miles	120
Commissaries, at $2.50 per day	200
Assistant, at $2 per day	160
Wagon master, at $2.50 per day	200
Assistant, at $2 per day	160
Interpreter, at $2.50 per day	200
Total	65,880

RESOLUTION OF THE CHEROKEE COUNCIL.

Whereas the title of the Cherokee people to their lands is the most ancient, pure and absolute known to man. Its date is beyond the reach of human record; its validity confirmed and illustrated by possession and enjoyment antecedent to all pretense of claim by any other portion of the human race;

And whereas the free consent of the Cherokee people is indispensable to a valid transfer of the Cherokee title; and whereas the said Cherokee people have, neither by themselves nor their representatives, given such consent, it follows that the original title and ownership of said lands still rest in the Cherokee Nation, unimpaired and absolute:

Resolved, therefore, by the committee and council and people of the Cherokee Nation in general council assembled, That the whole Cherokee territory, as described in the first article of the treaty of 1819 between the United States and the Cherokee Nation, and also in the constitution of the Cherokee Nation, still remains the rightful and undoubted property of the said Cherokee Nation; and that all damages and

losses, direct or indirect, resulting from the enforcement of the alleged stipulations of the pretended treaty of New Echota, are, in justice and equity, chargeable to the account of the United States;

And whereas the Cherokee people have existed as a distinct national community in the possession and exercise of the appropriate and essential attributes of sovereignty for a period extending into antiquity beyond the dates and records and memory of man;

And whereas these attributes, with the rights and franchises which they involve, have never been relinquished by the Cherokee people, but are now in full force and virtue;

And whereas the natural, political, and moral relations subsisting among the citizens of the Cherokee nation toward each other and toward the body politic can not in reason and justice be dissolved by the expulsion of the nation from its own territory by the power of the United States Government:

Resolved, therefore, by the national committee and council and people of the Cherokee Nation in general council assembled, That the inherent sovereignty of the Cherokee Nation, together with the constitution, laws, and usages of the same, are, and by the authority aforesaid are hereby declared to be, in full force and virtue, and shall continue so to be in perpetuity, subject to such modifications as the general welfare may render expedient.

Resolved further, That the Cherokee people, in consenting to an investigation of their individual claims, and receiving payment upon them and for their improvements, do not intend that it shall be so construed as yielding or giving their sanction or approval to the pretended treaty of 1835, nor as compromitting in any manner their just claim against the United States hereafter for a full and satisfactory indemnification for their country and for all individual losses and injuries.

Be it further resolved, That the principal chief be, and he is hereby, authorized to select and appoint such persons as he may deem necessary and suitable for the purpose of collecting and registering all individual claims against the United States, with the proofs, and to report to him their proceedings as they progress.

RICHARD TAYLOR,
President of the National Committee.

GOING SNAKE,
Speaker of the Council.

AUGUST 1, 1838.

Whereas the general council of the Cherokee Nation did, on the 26th day of July, by a special resolution, authorize the undersigned to enter into, in behalf of the nation, such arrangements with Major-General Winfield Scott as were deemed necessary and proper to place in the hands of the Cherokees the entire control and management of their emigration west of the Mississippi; and whereas the said arrangements having been entered into and the whole management of the emigration committed to the undersigned, and it being extremely desirable that there may be no delay in the preparatory arrangements for removal, and in order to expedite the completion of the same; therefore, it is by the committee, in behalf of the nation, determined that John Ross be, and he is hereby, fully authorized and empowered to make such requisitions for money as from time to time he may deem necessary for the Cherokee emigration, upon such officers of the United States Government as *may have the control of funds for this service*, and to receipt for the same for the Cherokee Nation.

RICHARD TAYLOR.
SAMUEL GUNTER.
(And Others.)

CHEROKEE AGENCY, *August 1, 1838.*

HEADQUARTERS EASTERN DIVISION,
Cherokee Agency, August 1, 1838.

GENTLEMEN: In your note of yesterday you estimate that $65,880 will be the necessary cost of every thousand Cherokees emigrated by land from this to their new country.

As I have already stated to some of you in conversation, I think the estimate an extravagant one.

Take the principal item or basis of your calculation—1 wagon and 5 saddle horses for every 20 souls.

I have already consented, with a view to lighten the movement by land, that all

the sick, crippled, and superannuated of the nation should be left at the depots until the river be again navigable for steamboats. All heavy articles of property not wanted on the road may wait for the same mode of conveyance.

Deducting the persons just mentioned, I am confident that it will be found that among every thousand individuals, taken in families, without selection, there are at least 500 strong men, women, boys, and girls, not only capable of marching 12 or 15 miles a day, but to whom the exercise would be beneficial, and another hundred able to go on foot half that distance daily. There would then be left, according to your basis, but 200 souls to be steadily transported in 50 wagons, or only 4 to a wagon.

Now the wagons being large, and each drawn by five or six horses (as must be presumed from your high estimate of $7 for each wagon going and returning), it strikes me that one such team and five horses ought to accommodate, on the route, 30 or 35 emigrants, including subsistence for a day or two, from depot to depot.

I repeat that I do not absolutely reject or cut down your estimate (which I think also too high) in putting down the rations at 16 cents each. The whole expense of the emigration is to be paid out of appropriations already made by Congress, the general surplus of which is to go to the Cherokee Nation in various forms; therefore they have a direct general interest in conducting the movement as economically as comfort will permit. Nevertheless, for the reasons stated, I wish the several items of the estimate submitted to be reconsidered.

I remain, gentlemen, yours, respectfully,

WINFIELD SCOTT.

Messrs. J. ROSS, E. HICKS, J. BROWN, and Others,
Agents, etc.

No. 7.

CHEROKEE AGENCY, EAST, *August 2, 1838.*

SIR: We have had your reply of yesterday's date to our estimate under consideration. The estimate we believe reasonable, having the comfortable removal of our people solely in view, and endeavoring to be governed, as far as that object will allow, by the rates of expenditure fixed by officers of the Government.

After the necessary bedding, cooking utensils, and other indispensable articles of 20 persons (say four or five families) are placed in a wagon, with subsistence for at least two days, the weight already will be enough to exclude, in our opinion, more than a few persons being hauled. The great distance to be traveled, liability to sickness on the way of grown persons, and the desire of performing the trip in as short a time as possible, induce us still to think our estimate of that item not extravagant.

In relation to the ration at 16 cents, the estimate is fixed at a rate which the Government agents had already made some arrangements to have them supplied.

The addition, however, of sugar and coffee has been made under this estimate, which we trust will be reasonable enough.

In our estimate we omitted an item which we deem indispensable; but propose now the addition of soap, the quantity and cost of delivery at the rate of 3 pounds to every 100 rations, at 15 cents per pound.

Whatever may be necessary in the emigration of our people to their comfort on the way and as conducive to their health we desire to be afforded them; at the same time it is our anxious wish in the management of this business to be free at all time from the imputation of extravagance.

With high respect, we have the honor to be your obedient servants,

JNO. ROSS.
R. TAYLOR.
(And Others.)

Maj. Gen. WINFIELD SCOTT, U. S. A.,
Commanding.

No. 8.

HEADQUARTERS EASTERN DIVISION,
Cherokee Agency, August 2, 1838.

GENTLEMEN: By your note of this date, in reply to my remarks of yesterday on your estimate of the day before, I perceive that after a full consideration you adhere to the calculation of $65,880, with a slight addition for soap, for the comfortable

emigration by land of every thousand Cherokees from this to their new country west of the Mississippi.

As the Cherokee people are exclusively interested in the cost as well as the comfort of the removal, I do not feel myself at liberty to withhold my sanction. The estimate, therefore, submitted to me on the 31st ultimo, with the small addition for soap, is hereby approved.

I remain, gentlemen, yours, respectfully,

WINFIELD SCOTT.

Messrs. J. ROSS, R. TAYLOR, E. HICKS, E. GUNTER, J. BROWN, WHITE PATH, and SITUWAKEE, *Cherokee Agents for Emigration.*

TAKATTOKAH, *June 15, 1839.*

Whereas the people of the Cherokee Nation, east, having been captured and ejected from the land of their fathers by the strong arm of the military power of the United States Government and forced to remove west of the River Mississippi; and

Whereas previous to the commencement of the emigration measures were adopted in general council of the whole nation, on the 21st of July and August 1, 1883, wherein the sentiments, rights, and interests of the Cherokee people are fully expressed and asserted; and

Whereas under those proceedings the removal took place, and the late emigrants arrived in this country and settled among those of their brethren (who had previously emigrated), on lands which had been exchanged for with the United States by the Cherokee Nation for lands east of the River Mississippi; and

Whereas the reunion of the people and the adoption of a code of laws for their future government are essential to the peace and welfare of the whole nation, and it being agreed upon that the Eastern and Western Cherokees henceforward be united as a body politic, and shall establish a government west of the River Mississippi, to be designated the Cherokee Nation: Therefore,

Resolved by the committee and council of the Eastern and Western Cherokees in general council assembled, etc.

(Here follows plan for revising laws, etc.)

[House Doc. No. 286. Twenty-fourth Congress, first session.]

MEMORIAL OF THE CHEROKEE REPRESENTATIVES, SUBMITTING THE PROTEST OF THE CHEROKEE NATION AGAINST THE RATIFICATION, EXECUTION, AND ENFORCEMENT OF THE TREATY NEGOTIATED AT NEW ECHOTA IN DECEMBER, 1835.

[June 21, 1836.]

To the honorable the Senate and House of Representatives of the United States of North America in Congress assembled:

The undersigned representatives of the Cherokee Nation east of the River Mississippi, impelled by duty, would respectfully submit for the consideration of your honorable body the following statement of facts:

It will be seen from the numerous subsisting treaties between the Cherokee Nation and the United States that from the earliest existence of this Government the United States in Congress assembled received the Cherokee and their nation into favor and protection, and that the chiefs and warriors, for themselves and all parts of the Cherokee Nation, acknowledged themselves and the said Cherokee Nation to be under the protection of the United States of America, and of no other sovereign whatsoever; they also stipulated that the said Cherokee Nation will not hold any treaty with any foreign power, individual State, or with individuals of any State; that for and in consideration of valuable concessions made by the Cherokee Nation, the United States solemnly guaranteed to said nation all their lands not ceded, and pledged the faith of the Government that "all white people who have intruded, or may hereafter intrude, on the lands reserved for the Cherokees shall be removed by the United States and proceeded against according to the provisions of the act passed March 30, 1802," entitled "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers."

It would be useless to recapitulate the numerous provisions for the security and protection of the rights of the Cherokees to be found in the various treaties between

their nation and the United States. The Cherokees were happy and prosperous under a scrupulous observance of treaty stipulations by the Government of the United States, and from the fostering hand extended over them they made rapid advances in civilization, morals, and in the arts and sciences. Little did they anticipate that when taught to think and feel as the American citizen, and to have with him a common interest, they were to be despoiled by their guardian, to become strangers and wanderers in the land of their fathers, forced to return to the savage life, and to seek a new home in the wilds of the far West, and that without their consent.

An instrument purporting to be a treaty with the Cherokee people has recently been made public by the President of the United States that will have such an operation if carried into effect. This instrument, the delegation aver before the civilized world, and in the presence of Almighty God, is fraudulent, false upon its face, made by unauthorized individuals, without the sanction and against the wishes of the great body of the Cherokee people. Upward of 15,000 of those people have protested against it, solemnly declaring they will never acquiesce. The delegation would respectfully call the attention of your honorable body to their memorial and protest, with the accompanying documents, submitted to the Senate of the United States, on the subject of the alleged treaty, which are herewith transmitted, etc.

The Cherokee territory within the limits of North Carolina, Georgia, Tennessee, and Alabama, is estimated to contain 10,000,000 acres. It embraces a large portion of the finest lands to be found in any of the States, and a salubrity of climate unsurpassed by any, possessing superior advantages in reference to water power, owing to the numerous rills, brooks, and rivers which flow from and through it. Some of these streams afford good navigation; others are susceptible of being easily improved and made navigable. On the routes where roads have been opened by the Cherokees through this country there must necessarily pass some of the most important public roads and other internal improvements, which at no distant day will be constructed.

The entire country is covered with a dense forest of valuable timber, also abounding in inexhaustible quarries of marble and limestone. Above all, it possesses the most extensive regions of the precious metals known in the United States. The riches of the gold mines are incalculable, some of the lots of 40 acres of land, embracing gold mines, which have been surveyed and disposed of by lottery, under the authority of Georgia (with the incumbrance of the Indian title), have been sold for upward of $30,000.

There are also extensive banks of iron ore interspersed throughout the country. Mineralogists who have traveled over a portion of this territory are fully persuaded, from what they have seen, that lead and silver mines will also be found in the mountain regions. Independent of all these natural advantages and invaluable resources, there are many extensive and valuable improvements made upon the lands by the native Cherokee inhabitants and those adopted as Cherokee citizens by intermarriages.

The Cherokee population has recently been reported by the War Department to be 18,000, according to a census taken by agents appointed by the Government. This people have become civilized and adopted the Christian religion. Their pursuits are pastoral and agricultural, and in some degree, mechanical. Their stocks of cattle, however, have become greatly reduced in numbers within the few past years, owing to the unfortunate policy which has thrown upon this territory a class of white and irresponsible settlers, who, disregarding all laws and treaties, so far as the rights of the Cherokees are concerned, and who have been actuated more from sordid impulses of avarice than by any principle of moral obligation or of justice, have by fraud and force made Cherokee property their own.

The possessions of the Cherokee inhabitants consist of houses which cost generally from $50, $100, to $1,000, and in many instances up to $5,000; some few as high as $6,000, $8,000, and $10,000, with corresponding outbuildings, consisting of kitchens, meat houses, dairies, granaries or corneribs, barns, stables, etc., grist and saw mills. Connected with these are gardens for culinary vegetables; also peach and apple orchards; lots of inclosed ground for horses, black cattle, etc. The farms of the Cherokees contain from 10, 20, 30, 40, 50, 60, to 100, 150, and 200 acres of land under cultivation, and inclosed with good rail fences. Among the most wealthy there are farms of 300 and 400 acres, and in one instance perhaps about 800 acres in cultivation.

Some of the most extensive and valuable farms and possessions have been forcibly wrested from the proprietors by the Georgia guard and agents, and citizens of Georgia put in possession of them, whilst the Cherokee owners have been thrust out to seek shelter in a camp, or under the roof of a log hut in the woods, within the limits of North Carolina, Tennessee, and Alabama. There are many valuable public ferries also owned by the Cherokees; the income of some of them amount to from $500 to $1,000, $1,500, and $2,000 per annum. Several public roads opened at private expense were also kept up by companies under regulations of the national council, and tollgates were erected on them. These regulations have all been prostrated by

State legislation, and the Cherokee proprietors thus deprived of their rights, privileges, and property. Besides all this, there are various important interests and claims which are secured by the provisions of the former subsisting treaties to the the Cherokees, and for which the United States in justice are bound to allow indemnification.

For the surrender, then, of a territory containing about 10,000,000 acres, together with the various interests and claims spoken of, and the amount that will be required to cover these claims, no man without data can form any estimate. The sum of $5,600,000 only is proposed to be paid; the price given for the lands at this rate would not exceed 30 cents per acre. Will Georgia accept the whole amount for that portion within her limits?

The faith of the United States being solemnly pledged to the Cherokee Nation for the guarantee of the quiet and uninterrupted protection of their territorial possessions forever, and it being an unquestionable fact that the Cherokees love their country and that no amount of money could induce them voluntarily to yield their assent to a cession of the same, but, when under all the circumstances of their peculiar situation and unhappy condition, the nation sees the necessity of negotiating a treaty for their security and future welfare, and having appointed a delegation with full powers for that purpose, is it liberal, humane, or just that a fraudulent treaty, containing principles and stipulations altogether objectionable and obnoxious to their own sense of propriety and justice, should be enforced upon them? The basis of the instrument, the sum fixed upon, the commutation of annuities, and the general provisions of the various articles it contains are all objectionable. Justice and equity demands that, in any final treaty for the adjustment of the Cherokee difficulties their rights, interests, and wishes should be consulted, and that the individual rights of the Cherokee citizens in their possessions and claims should be amply secured, and as freemen they should be left at liberty to stay or remove where they please.

Also that the territory to be ceded by the United States to the Cherokee Nation west of the Mississippi should be granted to them by a patent in fee simple, and not clogged with the conditions of the act of 1830, and the national funds of the Cherokees should be placed under the control of their national council.

The delegation must repeat, the instrument entered into at New Echota, purporting to be a treaty, is deceptive to the world and a fraud upon the Cherokee people. If a doubt exists as to the truth of their statement a committee of investigation can learn the facts, and it may also learn that if the Cherokees are removed under that instrument it will be by force. This declaration they make in sincerity, with hearts sickening at the scenes they may be doomed to witness. They have toiled to avert such a calamity; it is now with Congress, and beyond their control. They hope they are mistaken, but it is hope against a sad and almost certain reality.

It would be uncandid to conceal their opinions, and they have no motive for expressing them but a solemn sense of duty. The Cherokees can not resist the power of the United States, and should they be driven from their native land then will they look in melancholy sadness upon the golden chains presented by President Washington to the Cherokee people as emblematical of the brightness and purity of the friendship between the United States and the Cherokee Nation.

JNO. ROSS,
JOHN MARTIN,
JAMES BROWN,
JOSEPH VANN,
JOHN BENGE,
(And Others,)
Representatives of the Cherokee Nation.

WASHINGTON CITY, *June 21, 1836.*

[House Doc. No. 99. Twenty-fifth Congress, second session.]

MEMORIAL OF A DELEGATION OF THE CHEROKEE NATION REMONSTRATING AGAINST THE INSTRUMENT OF WRITING (TREATY) OF DECEMBER, 1835.

[December 15, 1837.]

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The memorial and petition of the undersigned, a delegation appointed by the Cherokee Nation on behalf of themselves and their constituents, respectfully showeth:

That at this session of your honorable bodies, held during the preceding winter, a memorial was prepared to lay before your honorable bodies on behalf of the Chero-

kee Nation setting forth their grievances. This paper was laid before the Senate, but no opportunity presented itself to submit it to the House of Representatives. To this document the undersigned pray leave to refer as part of this their present petition and to request that it may receive your attention and regard.

Subsequent to the termination of that session of Congress and after the installation of the present Chief Magistrate in the Executive Chair, we addressed to him a memorial, a copy of which is appended, and to the contents of which we implore your earnest attention. The documents referred to in those papers are on the files of your honorable bodies or in the War Department.

Since that period the Cherokee people have again, in full national council, appointed the undersigned as their representatives to lay before the Government of the United States a statement of their condition, and clothed them with full authority to enter into such arrangements as may be concurred in by the United States. These proceedings are herewith submitted.

A special agent of the United States was at that time in our country. A copy of the resolutions of the general council was transmitted to him, and an opportunity was offered that gentleman of seeing for himself what was the position, and ascertaining for himself what were the opinions and sentiments of our people.

That gentleman won for himself our respect and high regard. Doubtless he has communicated to the Executive the result of his observations; and such is the confidence we repose in him that we feel assured his representations accord with the facts.

Although we had not consummated with him any arrangement, yet his conciliatory tone, and the sympathy he expressed toward us, reanimated our hopes; and when, upon our arrival at this place, and having had an interview with the President, we learned that he was to be the organ of communication between us and the War Department, we could not but indulge the expectation that we might yet conclude such an arrangement as would be mutually and equally satisfactory.

This cup of hope has been dashed from our lips. The negotiations with him have been terminated; and the Secretary has, while refusing to treat with us upon any basis that we could suggest, and declining to intimate to us what the Executive would be disposed to grant, intimated to us the fixed and unalterable determination to enforce upon us the stipulations of the fraudulent and invalid instrument purporting to be a treaty negotiated at New Echota in 1835.

Such being the decision of the Executive, we have no alternative but an appeal to your honorable bodies. No denial has been given to our statement of the facts connected with that document; it is not asserted that it was fairly and honestly made; it is not alleged that it was negotiated with persons authorized to represent and to bind our nation; it is not intimated that it ever was authorized or recognized by our people. Indeed, there could be no shadow of ground upon which to question or to controvert our assertions upon these points.

Yet we are told that the Executive has no discretion—has no power to disregard it or to enter into any arrangement inconsistent with its provisions. And this is substantially all the answer we can obtain.

On a former occasion when, under similar circumstances, it was represented to the Government of the United States that an instrument, purporting to be a treaty, had been executed by parties unauthorized by those whom they professed to represent, an inquiry was instituted, the truth of the allegations ascertained, and the Executive promptly redressed the wrong. A new treaty was concluded, the first provision of which was to annul that which had been imposed by fraud upon the President and Senate. It was from looking to that case that we have erred, if we were wrong in supposing that it was the Executive to whom we were to address ourselves.

But we can not and will not yet believe that we are remediless; that because from imperfect knowledge of the circumstances of the case those who signed the instrument of which we complain were supposed to be authorized, and therefore the validity of their acts was presumed; that when the contrary is alleged all inquiry will be refused, and when proved the United States will persevere in demanding at our hands the fulfillment of the stipulations of a void and fraudulent contract.

We can not for a moment suspect that either the disposition or the power is wanting to annul this instrument if it be ascertained to be open to the objections we have urged against it. Knowing as we do that these objections are true to their very letter, we have never relinquished the hope that we should ultimately receive justice.

A charge has been made against some of our number that we have misled our people by inducing them to entertain false hopes. In the most solemn manner, and with a due sense of the responsibility we incur, we assert that the only hopes we ever encouraged were that the United States would never perpetrate injustice and wrong against those over whom they had voluntarily assumed the relationship of guardian and protector; that they would listen to our remonstrances, hear our petition, investigate the facts, and decide in conformity with the immutable principles of equity, justice, and good faith. If these be false hopes we shall admit not only

that we have been egregiously deceived ourselves, but have been instrumental in deceiving others.

Independently of our objections to the instrument in question, we have other causes of complaint to lay before your honorable bodies. We complain of the outrages which have been inflicted upon our persons and property—lawless arrests, open acts of violence perpetrated upon both.

We complain of sending among us a large armed force, of the attempts made to prevent the expression of opinion among us, of the arrest and imprisonment of our persons, of the expulsion of our people from their homes; for which even the document in question furnishes no ground or cause. All these, however, sink into insignificance when compared with the one overwhelming calamity, present and prospective, of having the instrument of December, 1835, enforced upon us and our people.

To these prayers we again, in the name of our nation, solicit your attention. Our last and only hope depends upon your honorable bodies. Under our present impressions we feel it due to ourselves frankly to state that the Cherokee people do not and will not recognize the obligation of the instrument of December, 1835.

We reject all its terms, we will receive none of its benefits. If it is to be enforced upon us it will be by your superior strength. We shall offer no resistance, but our voluntary assent never will be yielded. We are aware of the consequences; but while suffering them in all their bitterness, we shall submit our case to an all-wise and just God, in whose providence it is to maintain the cause of suffering innocence and unprotected feebleness.

JOHN ROSS.
R. TAYLOR.
EDWARD GUNTER.
JAMES BROWN.
ELIJAH HICKS.
SAMUEL GUNTER (his x mark).
SITEWAKEE (his x mark).
WHITE PATH (his x mark).

WASHINGTON CITY, *December 15, 1837.*

[House Doc. No. 316, Twenty-fifth Congress, second session.]

MEMORIAL OF THE CHEROKEE DELEGATION, SUBMITTING THE MEMORIAL AND PROTEST OF THE CHEROKEE PEOPLE TO CONGRESS.

[March 12, 1838.]

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The undersigned delegation from the Cherokee Nation most respectfully beg leave to submit the accompanying memorial, bearing 15,665 signatures of the Cherokee people, together with some papers annexed, which have just been dispatched to the delegation by express from their constituents. To these documents the attention of your honorable bodies is respectfully requested; and, as in duty bound, your memorialists will ever pray.

JNO. ROSS.
R. TAYLOR.
EDWARD GUNTER.
ELIJAH HICKS.
JAMES BROWN.
SAMUEL GUNTER (his x mark).
SITEWAKEE (his x mark).
WHITE PATH (his x mark).

WASHINGTON CITY, *March 12, 1838.*

[February 22, 1838.]

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

Most humbly and most respectfully showeth:

That whereas we, the undersigned, citizens of the Cherokee Nation, have always regarded the instrument purporting to be a treaty made in December, 1835, at New Echota, by the Rev. John F. Schermerhorn and certain unauthorized individual

Cherokees, to be a violation of the fundamental principles of justice and an outrage on the primary rules of national intercourse, as well as of the known laws and usages of the Cherokee Nation, and therefore to be destitute of any binding force on us;

And whereas at a general council of the nation held at Red Clay in September, 1836, our sentiments were set forth, and our solemn protest entered against it;

And whereas at a subsequent general council of the nation held at Red Clay in August, 1837, a communication from the President of the United States on the subject of said instrument was delivered in full council by Col. John Mason, special agent of the United States;

And whereas after mature deliberation on the said communication the resolutions of the preceding council in reference to that compact were reaffirmed, together with the memorial which accompanied the same;

And whereas we entertained the belief that through the medium of the special agent's report the President would become correctly informed of the true state of the matter and of the real sentiments of the Cherokee people;

We therefore cherished the confident hope that he would abrogate that fraudulent instrument and at once enter into arrangements with us for the adjustment of all difficulties.

With these views, we then appointed a delegation to represent us before the Government of the United States, and vested them with full powers to make final arrangements of all matters in controversy; and we were animated with the prospect of a speedy termination of our distresses. But the cup of hope is dashed from our lips; our prospects are dark with horror, and our hearts are filled with bitterness. Agonized with these emotions, language fails, our tongues falter as we approach the bar of your august assemblies, before whom we again beg leave humbly to present our grievances.

With the full details of our troubles we forbear to trespass on your indulgence. They are extensively known, and our delegation now at Washington will be found ready to furnish any information which may be needed. We therefore respectfully present the following, which will show the appalling circumstances in which we are placed by the operation of that perfidious compact.

A communication has recently issued from the United States agency, addressed to the chief, headsmen, and people of the Cherokee Nation, in which we are told that "The Executive has formally declined all intercourse or correspondence with Mr. Ross in relation to the treaty," and "that an end has been put to all negotiation upon the subject. * * * That it is the unalterable determination of the President to execute the treaty. * * * The time can not possibly be prolonged. * * * Another day beyond the time named can not and will not be allowed you."

The writers say, "We will not attempt to describe the evils that may fall upon you if you are still obstinate and refuse to conform to the requirements of the treaty; * * * we will not paint the horrors that may ensue in such an event." It will be readily conceived that declarations like these, emanating from such a source, our country already filled with troops, can not fail to fill our minds with consternation and surprise. What have we done to merit such severe treatment? What is our crime? Have we invaded anyone's rights? Have we violated any article of our numerous treaties? Have we, in any manner, acted in bad faith? We are not even charged with any such thing. But we are accused of "laboring under a dangerous error," and of being "duped and deluded by those in whom we have placed implicit confidence." Your pretended friends, say they, "have proved themselves your worst enemies."

But what is our "dangerous error?" Is it a "dangerous error" to believe that the great nation, whose representatives we now approach, will never knowingly sanction a transaction originated in treachery, and to be executed only by violence and oppression? It can not be. Is it a delusion to assert that the makers of that ill-omened compact were destitute of authority? This fact we are prepared to prove by incontestable evidence. Indeed, it is virtually admitted by the parties themselves. And the very fact that an armed force should be put in requisition to defend their persons and to compel our submission argues, not obscurely, a defect of confidence in the validity of the compact.

Is it obstinacy to refuse our assent to an act which is a flagrant violation of the first principles of free government, and which sets foot on the neck of our liberties and our dearest rights? Are we to be thus frowned into silence for attempting to utter our complaints in the ear of our lawful and covenanted protector? Is it a crime to confide in our chiefs, the men of our choice, whom we have tried and found faithful? We would humbly ask in whom should we confide? Surely not in those who have, in the face of our solemn injunctions, and in opposition to the reiterated expression of our sentiments, conspired the ruin of our country, usurped the powers of the nation, framed the spurious compact, and by artifice and fraud palmed it on the authorities of the United States and procured for it the recognition of those high functionaries.

And now, in the presence of your august assemblies, and in the presence of the Supreme Judge of the Universe, most solemnly and most humbly do we ask, Are we, for these causes, to be subjected to the indiscribable evils which are designed to be inflicted on us? Is our country to be made the scene of the horrors which the commissioners will not paint?

For adhering to the principles on which your great empire is founded, and which have advanced it to its present elevation and glory, are we to be despoiled of all we hold dear on earth? Are we to be hunted through the mountains like wild beasts, and our women, our children, our aged, our sick to be dragged from their homes like culprits and packed on board loathsome boats for transportation to a sickly clime?

Already are we thronged with armed men. Forts, camps, and military posts of every grade already occupy our whole country. With us it is a season of alarm and apprehension. We acknowledge the power of the United States; we acknowledge our own feebleness. Our only fortress is the justice of our cause. Our only appeal on earth is to your tribunal. To you, then, we look. Before your honorable bodies, in view of the appalling circumstances with which we are surrounded, relying on the righteousness of our cause and the justice and magnanimity of the tribunal to which we appeal, we do solemnly and earnestly protest against that spurious instrument.

And we do hereby also respectfully reaffirm, as a part of this our memorial, the resolutions and accompanying memorials of the last two general councils of the nation held at Red Clay. Our minds remain unaltered. We never can assent to that compact, nor can we believe that the United States are bound in honor or in justice to execute on us its degrading and ruinous provisions.

It is true we are a feeble people, and as regards physical power, we are in the hands of the United States; but we have not forfeited our rights, and if we fail to transmit to our sons the freedom we have derived from our fathers it must not be by an act of suicide; it must not be with our own consent.

With trembling solicitude and anxiety, we most humbly and most respectfully ask will you hear us? Will you extend to us your powerful protection? Will you shield us from the "horrors" of the threatened storm? Will you sustain the hopes we have rested on the public faith, the honor, the justice of your mighty empire? We commit our cause to your favor and protection. And your memorialists, as in duty bound, will ever pray.

Signed by 15,665 of the Cherokee people, as will appear by referring to the original, submitted to the Senate by the Cherokee delegation.

CHEROKEE NATION, *February 22, 1838.*

MEMORIAL OF THE DELEGATION OF THE CHEROKEE NATION.

[March 9, 1840.]

To the honorable the Senate and House of Representatives of the United States of America in Congress assembled:

"The petition and memorial of the undersigned, delegates and representatives of the Cherokee Nation, respectfully shows and represents:

"That the present position of the Cherokee Nation, and the events which have taken place since its cause was humbly submitted two years ago to Congress, are of a character to call for deep and immediate attention.

"Your memorialists have no desire, at this juncture, to dwell on the harrowing causes of the removal of the great mass of their people from their native and cultivated country east of the Mississippi to the wilderness of the West. The history of that capture is notorious; and that its agonies were mitigated, is owing to the considerateness of the stronger in not demanding of an entire people to say that they acknowledged what it was known they had disavowed, and to the permission humanely accorded to their leading men, of personally supervising the compelled removal.

"Your memorialists would here respectfully observe, that, when it was found indispensable, under all the circumstances, to change the mode at first contemplated for effecting the transit in question, those of your memorialists who were intrusted with the charge of reconciling their countrymen to it, and of conducting them to their destination, encountered difficulties in the task, of which it may be impossible for your honorable bodies to form any imagination. Many were the stern minds they had to alter, who, even when convinced of the hopelessness of retaining the inheritance they held so sacred, could only be persuaded not to die defending it, by a very slowly inspired reliance on promises that their consenting to remove would ensure peace and freedom to their children in a new and permanent home.

"For the success of those of your memorialists and others of their fellow-citizens who performed this difficult office it was fortunate that they were encouraged to assure their indignant, reluctant, and incredulous countrymen, that they would at length live unmolested in a region where their inspiriting national principle of self-government by the power of the majority was no more to be rendered inoperative; where they were to enjoy their own laws, and to be forever secured in the glorious privilege of feeling that they were men.

"The Cherokee Nation was removed; though, on their first capture by troops of the American Republic, estates, large and small, were, upon the instant, seized and sold to any sordid adventurer, at large commissions to the auctioneers and next to nothing for the owners; though, in the sudden and forced gathering of the people into separate masses by those troops, children were abruptly severed from doting parents who never met them more; though even the young husband was doomed to know that his wife, whom he was not permitted to protect nor even to behold, had to pause before the rough soldier on the road to a military camp, and, under these maddening circumstances, hear the first cry of her infant; though vast multitudes of both sexes and of all ages, ever until then habituated to domestic comforts, were sickened by the wretchedness and unwholesomeness of being congregated into open fields and crowded under tents during the most scorching heat of summer, and thousands of those nearest and dearest to many of us at length sunk into miserable graves; yes, though all these aggravations clustered around us on every side, still the drooping Cherokees were cheered on finding their armed captors eventually withdrawn and their conduct into exile transferred to persons among themselves in whom they could confide."

The memorial recites the removal, the unavoidable conflict with the Western Cherokees, the difficulties of arranging a union, their final success, the calumnies filed against John Ross on account of the murders of the Ridges and Boudinot, and concludes by maintaining their position that the treaty 1835 was void, and that it was necessary to adjust their relations independently of that treaty, using the following language:

"Your memorialists, therefore, humbly state that, having full powers from the Cherokee people to bring all questions between them and the United States to a close, they have been waiting for some time in Washington, for the purpose—

"First. Of obtaining indemnification for the country which has been taken away from them east of the Mississippi, and for the loss of private property and for injuries sustained in their forced removal.

"Second. Of establishing a satisfactory definition of the tenure under which they are to hold their lands in the West.

"Third. Of procuring some specific stipulations of the relations which are to exist between them and the United States. And,

"Fourth. Of bringing the balance yet due for the expenses of their recent emigration under General Scott to an immediate settlement.

"And your memorialists throw themselves on the humanity and justice of your honorable bodies, as the only resource now left for the arrangement of these momentous affairs, to open the door for their relief by such action as the wisdom of your honorable bodies may devise, and the circumstances of our case urgently demand.

"And your memorialists will ever pray.

JOHN ROSS.
JOHN LOONEY.
(And Others.)

"WASHINGTON CITY, *February 28, 1840.*"

REMOVAL OF THE CHEROKEES, ETC.

[House Report No. 288. Twenty-seventh Congress, third session, Vol. IV.]

[March 2, 1843.]

Mr. Cooper, of Pennsylvania, from the Committee on Indian Affairs, submitted the following report:

On the 9th of July, 1842, the House of Representatives adopted a resolution in the following words:

"*Resolved*, That the Committee on Indian Affairs be, and hereby are, instructed to inquire into the contract for the removal of the Cherokee Indians to the west of the

Mississippi River; the amount contracted for the removal; the amount actually paid; how and by what officer the account of the contractor was settled and allowed; whether there was any appeal from such settlement, and the decision on the appeal, and whether the appeal was final or not; by what officer and by what authority the account was reopened and finally settled and allowed, and out of what fund such account was paid, and on what authority; also to inquire whether any and what other offers had been made for their removal, and why not accepted; and whether any further and what further action of Congress should be had for the protection of the Cherokees, or to guard the public Treasury; and that the said committee have power to send for persons and papers."

The Committee on Indian Affairs, in pursuance of the above resolution, report:

That the inquiries directed by the same are hereinafter stated and answered in order:

First. What was the amount contracted to be paid per head for the removal of the Cherokees to the west of the Mississippi?

By a contract made on the 2d of August, 1838, by General Scott, as agent of the United States, with John Ross, Elijah Hicks, and others, on the part of the Cherokees, the sum of $65.88 was stipulated to be paid per head for the removal of the Cherokees to the country assigned them beyond the Mississippi. (See p. 12.) This price General Scott regarded as extravagant.

R. E. Clements, who was examined as a witness on this subject, states that "he considers the price paid to John Ross, agreeably to his contract, as having been exceedingly extravagant." He says further, that "there were persons on the ground every way able and competent to carry out the contract who would have taken it for less than one-half the amount agreed to be paid to John Ross." (See deposition, p. 41 of this report.) Gary Hinant, another witness, states that he was a citizen of the Cherokee Nation, and removed himself; that he was fifty-five days on the route; that he moved at his ease, stopping when necessary for rest and refreshment, and that his expenses after starting were less than $20 per head. The distance was about 800 miles. (Deposition, p. 45.)

The treaty party offered to remove themselves for $40 per head, and Watson & Co. offered to do it at $32 per head. The Secretary of War estimated the cost of removal at $30 per head. (See report Commissioner of Indian Affairs, p. 12, et seq.)

Second. What amount was actually paid per head for the removal of the Cherokees?

The amount actually paid was $103.25 per head. The amount contracted to be paid, as before stated, was $65.88, or, with a small allowance which was made for soap, $66.24. The whole amount due Ross, estimating at $66.24 per head, was $776,398.98, which was paid to him by Captain Page, the disbursing agent of the Government, on the 13th November, 1838. The whole claim of Mr. Ross was $1,263,338.38, or at the rate of $103.25 per head.

Third. How was this claim settled, and by what officer was it allowed?

The claim presented by John Ross to the Commissioner of Indian Affairs, as before stated, amounted to $1,263,338.38. Of this claim $776,398.98 had been paid, and was allowed; the remainder, amounting to $486,939.50, was rejected. This amount is over and above the contract, and is claimed on the ground that what is termed the contract was a mere estimate, and the amount mentioned in the same liable to be increased or diminished accordingly as a greater or less time should be occupied in the removal. (See report Commissioner Indian Affairs, p. 12, et seq.)

Fourth. Was there an appeal from the decision of the Commissioner of Indian Affairs; to what officer, and what was the decision on the appeal?

When the amount of $486,939.38 was rejected by the Commissioner of Indian Affairs an appeal was taken by John Ross to the Secretary of War, who affirmed or approved the decision of the Commissioner. The case was then brought before the President, and the decision of the War Department affirmed. Afterwards, on the 7th of January, 1841, this matter was again brought before the President (Van Buren) by the counsel of John Ross, with a request that he would review his former decision; but this he declined, stating that he regarded his former decision as final. (Pp. 25, 26.)

Fifth. Was the settlement of this claim opened; by what authority was it opened, and how was it finally disposed of?

The decision of the Commissioner of this claim, made on the 8th of August, 1840, and affirmed by the President of the United States on the 2d of September, 1840, was opened, by the direction of the present Chief Magistrate, some time in the spring of 1841, as appears from his letter of September 20, 1841, to John Ross and others, in which he informs them "that he had directed the Secretary of War to examine and settle the arrearages due for removal under the contract made with General Scott, in 1838." The claim for arrearages was accordingly reexamined, and $486,939.50 was finally ordered to be paid by the Secretary of War on the 6th of September, 1841. (See pp. 49, 50; see also report of Secretary of War, in which he says: "The ground on which the claim rests is materially changed by the statement of General Scott, made since the first decision, p. 28.)

The action of the executive officers in this case was, as the committee believe, in contravention of the rules heretofore observed, and repugnant to law, as expounded by various law officers of the Government in like cases. It is a rule, which each Administration has heretofore prescribed for its action, to consider the acts of its predecessors conclusive, as far as the Executive is concerned. And, without intending to cast censure or blame upon the Executive in this particular case, or to do more than simply arrange and embody the facts, the committee nevertheless feel bound to observe that under such precedent the Executive acts will always be liable to be disturbed as often as a successor shall think proper to review them. (See opinion of Mr. Attorney-General Wirt, Executive Document, second session Twenty-sixth Congress, vol. 2, 1840–41, p. 554; see also same volume, p. 841, opinion of Mr. Attorney-General Taney.)

Sixth. Out of what fund was the amount last allowed paid; to whom was it paid, and on what authority?

The sum of $186,939.38 was paid out of the fund arising under the Cherokee treaty of 1835–36. It was paid to John Ross on the authority, as the committee believe, of the following resolution of the Cherokee council, to wit:

"*Resolved by the Cherokee nation, through their National committee and council in national council assembled,* That it is hereby ordered that the aforesaid John Ross be, and he is hereby, directed and fully empowered to proceed to Washington City and urge a settlement of this claim with all possible expedition, and to apply for and receive from the Government of the United States, in the name of the Cherokee Nation, the balance due of $581,346.88¼ as stated in the account of the emigration claim, in order that the business growing out of it may be brought to a final close."

This sum of $581,346.88¼ includes a claim of Lewis Ross of $94,407.38, which has not been referred, not having relation to the subject of inquiry. It is, however, somewhat curious that the national council should undertake the settlement of a private claim. (For the fund out of which this claim was paid, see Statement A, p. 51.)

Seventh. Was any offer or bid made for the removal of the Cherokees and at what rate?

General Scott states in a letter to the Secretary of War, dated August 28, 1838, that the treaty party of the Cherokee Nation offered to remove themselves for $10 per head. Watson & Co. proposed to remove them at $32 per head, and R. E. Clements, a witness already referred to, states that there were persons on the ground who would have removed them for less than half the sum agreed to be paid to John Ross.

From the opinion entertained of the original contract (at $65.88 a head) by various persons, some idea may be formed of whether it was liberal or not. Bryan, Clements & Co. offered Lewis Ross $40,000 for his contract, which he declined. George D. Gordon, who was a partner of Lewis Ross to the extent of one-seventh, sold his interest to the latter for $15,000. If the profits on a seventh were $15,000 they would amount to $105,000 on the whole. John McCain, who was employed by Lewis Ross to assist him in the execution of his contract, and who kept the accounts of the purchases, etc., states that Ross could not have realized less than $150,000 on his contract as originally made. (See report of Commissioner of Indian Affairs, p. 12, et seq.)

Eighth. What action should be taken for the protection of the Cherokees, and to guard the Treasury?

This is a question which the committee find it difficult to answer. They submit (see Statement A) a table showing the amount appropriated, the objects to which it has been applied, as well as the amount remaining unexpended. From this the House will be able to form its own judgment, when it shall be called on to act on the subject.

Under the treaty and the acts passed to carry it into effect the Cherokees were entitled to $6,537,634. By the treaty $600,000 was set apart to pay the expenses of removal, but by the table above referred to it will be seen that the expense of removal and subsistence for a year exceeds the sum of $2,855,000. The amount paid to claimants for spoliations, reservations, and improvements is $2,217,328.90, and the whole amount expended is $5,388,178.23. The sum of $714,871.75 is invested in stocks for the benefit of the Cherokees, and there remains in the Treasury and in the hands of agents, $434,384.02. Of this last-mentioned sum $63,663.29 has been lost by the defalcation of Capt. R. D. C. Collins, as well as several smaller sums by other persons; so that there remains in the Treasury but $275,499.59. The payment to John Ross of the sums which he has received over and above the amount agreed to be paid him will probably be regarded as a matter of no pecuniary importance to the United States.

These sums were paid out of the fund arising under the treaty, or that which was appropriated by the act of 12th June, 1838. But it must be recollected that a portion of the funds arising under the treaty were applicable to certain specific objects; and if the Government has misapplied these funds so far that there does not remain

sufficient to meet these objects, the deficiency created by its abuse of its trust must be made good out of the Treasury. The payment to John Ross was an injury to that part of the nation who did not participate in the profits of his contract, and it is likely to prove an injury to this Government in the manner just mentioned.

Accompanying this report will be found the contract of General Scott with John Ross and others; the report of the Commissioner of Indian Affairs on the subject of Mr. Ross's claim; the review of the claim by Mr. Secretary Bell; the letter of the President to the Cherokee delegation; Mr. Ross's accounts; the testimony of a number of witnesses relative to the subject; together with a statement of the expenditures made from the Cherokee fund arising under the treaty of 1835-36, etc.

JOHN HOWARD PAYNE'S EVIDENCE.

John Howard Payne testified before the Committee on Indian Affairs in 1842 that he was employed by John Ross from 1835 to 1841 for the purpose of assisting him and the Cherokee delegation, sometimes, with him, to compose the difficulties between the Cherokees and the United States. His evidence is, in part, as follows (House Report, No. 1098, Twenty-seventh Congress, second session; House Reports of Committees, vol. 5, 1841-42):

"Second interrogatory. Was Mr. Ross opposed to the execution of the treaty made with the Cherokees in 1835-36? If aye, state in what manner his opposition was manifested. State particularly.

"Answer to second interrogatory. Mr. Ross never, to my knowledge, admitted, either directly or indirectly, that what the interrogatory terms 'the treaty made with the Cherokees in 1835-36,' either was fairly entitled to be considered as a real treaty, or was made with the Cherokees as a nation. * * *

"Third interrogatory. Has Mr. Ross ever informed you that he would never recognize the validity of the above-mentioned treaty? * * *

"Answer. * * * I have always supposed that Mr. Ross never would recognize the validity of what the interrogatory terms 'the treaty made with the Cherokees in 1835-36.' I can not state fully all that he said upon the subject, * * * but from the beginning to the end of my communications with him his views of it never appeared to vary.

"Fourth interrogatory. Were you present in Washington in 1839, when Mr. Ross presented his claim to the Department of War for the removal of the Cherokees? If aye, state whether the claim was against the United States or the Cherokee Nation.

"Answer. * * * I never understood that it was made against the Cherokee Nation, but always regarded it as a claim against the United States. Distinctly it seems to be stated as such in the memorial upon the general affairs of the Cherokees and the United States, which appears in Document 129 of the House of Representatives, first session Twenty-sixth Congress, where, on the 10th page, it forms the fourth and last article of the enumeration of objects sought by the delegation signing that memorial. Such also is my construction of the manner in which it was mentioned by John Ross in a message to the Cherokee council in October, 1840, in resolutions, and an order of the same council to John Ross for its enforcement, as well as in other official documents.

The language used by Mr. Ross in his message to the national council in the present Cherokee Nation, in October, 1840, is as follows (id., page 45):

JOHN ROSS'S MESSAGE, OCTOBER, 1840.

"* * * I abstain from remarking upon the postponement of the just dues to our nation, further than to add that the unanimity now prevailing among ourselves, and other circumstances, justify the expectation of a change of policy in the United States Government regarding our affairs. I will, therefore, hope that our countrymen will continue to be patient, and to place every confidence in the honesty and honor of the Government and people of the United States. Let us not afford an excuse for withholding our dues, by dissension among ourselves. Let us remain in the right, and trust to Providence and an upright cause for the result. The points for adjustment at Washington are more numerous and important now than ever. The country taken from us east of the Mississippi still remains unpaid for; the tenure under which our present lands in the West are granted continues undefined, as do the relations which are to subsist between us and the United States. But these multifarious calls are too severely known to you to require that I should enumerate them here.

"The utter disregard of all our claims at the American metropolis might have been more injurious than it proved had it not been for the timely aid of friends by whom your delegation were enabled to meet the expenses which were to have been defrayed with moneys long overdue from the United States that when applied for under your requisition were withheld. Thus embarrassed, I claimed, under a protest, the

proceeds of a partial valuation for improvements taken from me in our late country, and with these discharged the loan for the nation and paid all other demands against your delegates."

And on page 46, id:

"It was my hope to have had it in my power to close the whole business of the emigration at the present council, but I deeply lament that the course taken by the War Department in withholding a final settlement renders it impracticable. When our account, formed upon the basis distinctly understood between General Scott and our special agents, was presented for payment frivolous exceptions were taken against portions of it, and a balance due to the nation of $581,346.88½ was left unsettled; * * * The principle upon which the nation estimated our emigration expenses with General Scott was to receive for them the same amount which the removal would have cost had it been accomplished not by us but by the United States." * * *

The resolution of the national council empowering John Ross to receive from the United States the balance due for removal under the contract with General Scott, passed November, 1840 (id., 48), is as follows:

RESOLUTION OF CHEROKEE NATIONAL COUNCIL, NOVEMBER 11, 1840.

"Whereas, in the month of May, 1838, the Cherokee Nation east of the Mississippi was in a state of capture by an army of the United States, under the command of Major-General Scott, for the avowed purpose of removal west of the Mississippi;

"And whereas, at that crisis, it was thought expedient by the United States, in order to diminish the sources of irritation produced among the Cherokees by the hereinbefore stated and other causes, regarded by them as harsh and unauthorized, to change the mode of removal, with an understanding on the part of the Cherokees that their remaining concernments should be left for subsequent adjustment;

"And whereas, in consequence of the aforesaid change of policy, General Scott was vested with unlimited powers from the United States Executive to arrange with the Cherokees for their self-removal and for the withdrawal of his army;

"And whereas, pursuant to the authority in question, General Scott did arrange with the Cherokee Nation, through their regularly constituted special agents for that purpose, and which special agents calculated with General Scott a basis for the amount to be paid for the expense, rating the component parts from the customary allowance by the War Department upon such items, when contracted for with citizens of the United States;

"And whereas it was supposed that the emigration might be entirely completed in eighty days, more or less, although it was impossible to covenant for any specific term;

"And whereas it appeared that, if eighty days should be the time consummated in the emigration, the aggregate of the component parts of the aforesaid estimate would make the cost of each person for the eighty days amount to sixty-five dollars and eighty-eight cents; and hence, on that sum it was concluded to fix as the basis of the charge, to which it was agreed to add the single article of soap, at fifteen cents per pound;

"And whereas it was fully understood between the Cherokee Nation, through their special agents, and General Scott, fully empowered to represent in this matter the United States, that sixty-five dollars and eighty-eight cents, with the aforesaid addition for soap, was a fair allowance for eighty days' expenses each in emigrating the Cherokees; that amount per head being necessarily liable to reduction or to increase, at the same rate, in the event of a greater or a lesser length of time proving requisite for the purpose than the before-mentioned eighty days;

"And whereas, under the aforesaid arrangement, the Cherokee people were formed into thirteen detachments, and the removal was to proceed by such routes as might appear most eligible; but its commencement by no means to be delayed beyond the first day of September, one thousand eight hundred and thirty-eight, then next ensuing;

"And whereas, these conditions being fully settled, the special agents of the nation, acting on the nation's behalf, after having made divers appointments for the purpose of carrying it into effect, in order to condense the business, did delegate its entire superintendance to one of their body, John Ross; and by John Ross such persons were deputed for the management of the various departments, on account of the nation, as were considered best qualified for the purpose;

"And whereas, before the first day of September, one thousand eight hundred and thirty-eight, which day formed the limit of the term covenanted for, John Ross caused the removal to be commenced and the first detachment actually to be under way upon the twenty-eighth of August previous; but in consequence of the awful sickness among the people, and the drought which pervaded the country through which they had to pass, General Scott, and not John Ross, called a halt, and ordered the emigration to be suspended;

"And whereas the emigration, in consequence of this considerateness on the part of General Scott, actually was suspended for several weeks, and thereby a necessity entailed for further delay, and especially among some of the detachments, on arriving at the Mississippi, found it impassable, from the ice accumulated therein, in consequence of the advance of winter;

"And whereas the different causes of protraction extended the time occupied in removal variously, but in every instance beyond the limit first contemplated of eighty days, and consequently *enlarged proportionately the cost of the emigration to the United States;*

"And whereas it appears from the report of John Ross, the superintendent, that there is a balance still in arrear to the Cherokee Nation of five hundred and eighty-one thousand three hundred and forty-six dollars and eighty-eight and a half cents, which balance has been repeatedly applied for, but the payment of which has been withheld;

"Now, therefore, by the committee and council of the Cherokee Nation, in national council assembled, it is

"*Resolved*, That the conditions of the contract made between General Scott, on the part of the United States, and the special agents, including John Ross, on the behalf of the Cherokee Nation, for removing the Cherokees east of the Mississippi to their destination west of Arkansas, have (not) been scrupulously fulfilled on the part of the United States, as represented by General Scott.

"*Resolved*, That the aforesaid failure of the United States to sustain the pledges given to the Cherokee Nation by General Scott has caused the deepest distress among numbers of its citizens who have claims upon the balance due; and that a final settlement, especially under the trying circumstances of the Cherokee people of late, is of vital importance.

"*Resolved*, That the authority vested in the special agents, and continued by the act of union between the Eastern and Western Cherokees, passed at Illinois Camp Ground on the 12th day of July, 1839, and by them conferred upon one of their members, John Ross, as superintendent, with a view to facilitate the duties required of them, be, and the same is hereby, approved and ratified.

And further resolved (in support of the aforesaid authority), That, by the Cherokee Nation, through their national committee and council, in national council assembled, it is hereby ordered, that the aforesaid John Ross be, and he is hereby, directed and fully empowered to proceed to Washington City, and to urge a settlement of this claim with all possible expedition, and to apply for and receive from the Government of the United States, in the name of the Cherokee Nation, the balance due of five hundred and eighty-one thousand three hundred and forty-six dollars and eighty-eight and a half cents, as stated in the emigration claim, in order that the business growing out of it may be brought to a final close."

"Eleventh interrogatory. Against whom was Mr. Ross's claim first charged, and against whom was it charged in the second instance? * * *

Answer. * * * I know nothing whatever in relation to any shifting of the emigration claim from the United States to the treaty fund. As John Ross had never, to my knowledge, recognized the treaty, I could not of course suppose that he had recognized any treaty fund, as I had never found him to waver upon that point." (Id. p. 50.)

EVIDENCE ON JOHN ROSS'S CONTRACT.

Samuel C. Stambaugh testified before the same Committee on Indian Affairs August 6, 1842, and said in part:

"I never saw the decision of the Secretary of War upon that claim, or heard the grounds upon which he directed it to be paid out of the Cherokee fund. My impression always was, pending the prosecution of the claim, that it was against the United States and not the Cherokee Nation. It was based upon a contract made between the United States and individuals of the nation, not sanctioned by any provision of the treaty." (Id., p. 51.)

(Page 53.) "In reply to your second interrogatory I can say that I have no distinct recollection of any particular conversation I ever had with Mr. Ross upon the subject of the claim preferred by him against the United States for removing the Cherokees. I have frequently heard him speak of his difficulties with the War Department under Mr. Van Buren's Administration, and always understood that he refused to recognize the New Echota treaty of 1835, and, consequently, that he did not claim under that treaty; hence he must have charged his account for removing the Cherokees to the United States, and not to the Cherokee Nation, in the first instance."

Gideon F. Morris (p. 65):

"Question 10. Had you any conversation with John Ross while in this city in 1841, or since, in relation to the claim which he was then pressing? If yea, state against whom the claim was made, for what it was made, and the particulars of the conversation referred to.

"Answer. I have had different conversations with John Ross relative to the claim which was allowed him in 1841. I understood that the claim was one against the United States, and for services rendered in removing the Cherokees west of the Mississippi.

"Question 11. Did he (Ross) state that the claim was one against the United States and that he did not intend it to be a charge upon the Cherokee fund?

"Answer. I have heard John Ross say that his claim was against the United States and that it was not to come out of the Cherokee fund. I have heard others of the delegation (Mr. Benge and Mr. Vann) say the same thing—that Ross claimed it from the United States and not out of the Cherokee fund.

"Question 12. Did not Ross and his party always deny the validity of the treaty of 1835, and have they not refused to recognize it, and do they do so still?

"Answer. Mr. Ross and his party have in all their conversations with me uniformly denied the validity of the treaty of 1835 and refused to recognize it.

"Question 13. Out of what fund was this claim finally paid? Was it out of the Cherokee fund, and why?

"Answer. I have always understood that the claim was paid out of the Cherokee fund."

Garry Hinant (pp. 66-67):

"Question 3. Have you ever had any conversation with John Ross about his claim? If aye, state out of what fund he claimed to be paid and what he said on the subject.

"Answer. I have had conversations with the Cherokee delegation, and perhaps with Ross, on the subject of their or his claim, who said it was a claim against the United States generally, and not payable out of the Cherokee fund appropriated under the treaty of 1835 and 1836. He and they denied the validity of the New Echota treaty; said it was a fraudulent treaty, made without authority; never could recognize it as a treaty or receive any of the moneys appropriated to carry it into effect."

[House Report No. 1098, p. 66; report from Second Auditor's Office, August 18, 1843.]

1838.		
Aug. 4.	Paid to John Ross, principal chief and agent of the Cherokee Nation, on account of removal and subsistence	$130,000.00
Sept. 17.	....do	134,980.00
Oct. 16.	....do	264,980.00
Nov. 13.	....do	264,479.04
	Total	776,399.04
1841.		
Aug. 16.	Paid to John Ross and Lewis Ross, on account of carrying into effect treaty with Cherokees, allowed by Secretary of War	94,407.38
Sept. 17.	Paid to John Ross, principal chief and agent of the Cherokee Nation, specially authorized by the national council to apply for and receive the same, allowed by the Secretary of War	486,939.50
	Total	581,346.88
	Grand total	1,357,745.92

SERVICES OF TREATY PARTY.

June 2, 1846. In House Report No. 683, Twenty-ninth Congress, first session, Mr. Jacob Thompson, from the Committee on Indian Affairs, reports in favor of House bill 456, providing for separation of the Cherokee country between the factions and the removal and subsistence of the North Carolina Cherokees. The committee say, among other things:

"Before the treaty of 1835 the Cherokee council had issued a decree that any individual of that tribe who should sign a treaty for the cession of the Cherokee country should be considered as a traitor, and as such should be regarded as an outlaw. Notwithstanding this sentence and fearful penalty, after the Cherokee Nation was involved in the most perplexing difficulties with the State of Georgia, which, if persisted in, were calculated to disturb the peace and good feeling of the people of the whole Union; and after it became evident that to remain longer in their old country was destructive to their prosperity, and even of their national existence, and that the only means of saving their own people, and of removing from the States and

the General Government the perplexing question of conflicting jurisdictions which had sprung out of their remaining on this side of the Mississippi River, was to treat for the cession of all their country within the States; the treaty party, with a firmness of nerve and a purity of purpose which reflected upon them high honor, came forward, at the most earnest solicitation of the United States, entered into a treaty in the year 1835, in the face of the most violent opposition; braved the most unmeasured denunciations; and, in this manner, enabled our Government to avoid a conflict which threatened to shake our institutions to their very foundation."

GOVERNMENT PARTY.

[July 17, 1846. Indian Office Files.]

[Portion of argument.]

The whole amount paid to the Cherokee government for the expenses of emigration is $1,283,338.18½.

It is said that this sum is extravagant. If it were so, is the Government relieved from the obligation to pay it? With equal justice might it be said that the sum of $5,000,000 was an extravagant price for the lands east, and therefore it should not be paid.

But is it true in point of fact? What is the standard by which these expenses are to be estimated? Not surely the allowance which was made to individual Cherokees who might remove themselves. But the sum which such removal would have cost if it had been made by the Government of the United States through its agents. It need not be stated that a small party could have been removed at a less expense, proportionately, than a large one.

In cases of sickness and the attentions for burial the whole detachment must be detained, for they could not be separated. The only rule by which it could be estimated is the probable cost to the United States removing the Indians by its own agents. One of the detachments was removed by an officer of the Army of the United States—Lieutenant Dean—and the cost of removal was $61.70 each, within $5 of the sum agreed to be paid by the contract with General Scott, and which was all that it would have cost if the march had only occupied eighty days, as was reasonably estimated, but it required much more, from causes which I will now state.

The commencement of the march was delayed from the causes above stated until it could not be finished until the approach of winter, when the Mississippi River was frozen over and it was impossible to cross it. The detachments were delayed at that river more than a month; the days were short and cold, and a very short distance could therefore be accomplished over bad roads in the day, and hence the greater time occupied and the increased cost.

The great mortality on the route sufficiently proves that no excessive regard was paid to the comfort of the Cherokees, and this is the whole story of this emigration contract fairly and truly stated.

The Cherokees only ask the fulfillment of their contract, and the only reply that was ever made to them, whenever it was refused, was not to deny the contract, but to say that it was too good an one. Does it become the Government of the United States, after driving this poor and oppressed people from their homes, and at infinite sacrifices to them and loss of property, to higgle about a small sum, more or less, appropriated and contracted for, to add to their comfort and to mitigate the severity of the infliction upon them; still more to say we did so contract, but by care and economy you have saved $150,000, and therefore will pay you nothing. We could have contracted with others to have removed you for less. It is true that those with whom we should have contracted had no sympathies with you, and would have driven you as they would beeves to the shambles, or as they did the Creeks, whose unburied bodies were left rotting on the roadside.

I have already adverted to the letter of Mr. Poinsett, Secretary of War, written by the direction of the President, and dated May 18, 1838, in which he says: "I think that the expenses of your removal should be borne by the United States;" and on May 23, 1838, five days afterwards, he writes to General Scott to make an agreement with the headmen of the nation, which, "while it will secure their comfortable removal in the manner most agreeable to their chiefs and headmen, will effectually protect the interests of the United States and prevent all unnecessary delay—useless expenditures."

The language used is not "which will protect the Cherokee funds," but which "will protect the interests of the United States from unnecessary expenditures."

This language shows too plainly to admit of doubt what was the opinion of the Secretary of War. If anything more were required it is furnished by the letter of

the Secretary five days before, in which he says he thinks the expense ought to be borne by the United States.

It is true that General Scott, after the contract was made, said that the expense was to come out of the Cherokee funds, but the Cherokee contracting parties never assented to this. But what did General Scott mean by Cherokee funds; the price of the lands, $5,000,000? By no means but the $1,047,000; and the $600,000, doubtless supposing that they would be all sufficient and that the balance left would belong to the Nation. If these two funds had been sufficient they would have been charged with these expenses of removal. They were not, and the United States are bound in good faith to make them sufficient and not to take the treaty money to pay them. As well might the annuity fund or any other be seized on for that purpose. The United States were bound to pay the expense of removal—

1. Because the treaty of 1835 so stipulated.

2. Because the removal of all other Indian tribes, and the previous removal of portions of the Cherokees to the West, were made at the expense of the United States.

3. Because General Jackson, in a talk when the treaty of 1835 was submitted to the Cherokees, assured them that the cost of their removal would be paid by the United States.

4. Because the Secretay of War, under direction of the President, gave similar assurance in May, 1838.

5. Because the Senate so decided when the question was submitted to that body to declare the intention of its award.

6. Because the Congress of the United States so decided afterwards, in 1838, when asked for an additional appropriation to pay the expenses of removal.

7. Because it is only justice, not liberal but hard justice, and without it nothing will be left to distribute per capita, and the Eastern Cherokees will receive nothing for their lands and a most inadequate compensation for the sacrifices consequent upon their removal.

If the treaty fund is relieved from the charges for removal, spoliation claims, reservations, subsistence for one year paid to Glasgow and Harrison, it will then only be charged with—

800,000 acres land	$500,000
Funds invested	500,000
Improvements, ferries, etc., about	1,000,000
	2,000,000

leaving a balance of between $2,583,000 and $3,000,000 justly due as the balance of the purchase money agreed to be paid for the lands east of the Mississippi. If this sum is due now it was equally due on the ratification of the treaty. If the transaction were between individuals interest would be allowed. The Government of the United States has had the benefit of this money for eleven years, and the Cherokees have been deprived of it—not from any laches of theirs, for they have constantly and importunately asked for payment, and the debts of the Indians contracted on the faith of this fund have in that time doubled by the accumulation of interest, etc.

Filed July 17, 1846.

(For Treaty Party Argument, see 1, 2, 3, 4, and 5 in report of Committee on Indian Affairs, Senate Doc. No. 298, Twenty-ninth Congress, first session; House Doc. No. 185, Twenty-ninth Congress, first session.

POWERS OF THE ATTORNEY-GENERAL.

The Attorney-General has no power to give opinions concerning any matters pending in Congress upon request of either of the Houses or of any committee.

On January 20, 1869, Hon. Wm. M. Evarts, Attorney-General of the United States, confirmed the uniform opinion of the Attorneys-General of the United States as set forth by Attorneys-General Wirt, Taney, Crittenden, and Bates (1 Op., 335; 2 ib., 499; 5 ib., 561; 10 ib., 164), "that it was not competent for the Attorney-General to give opinions concerning any matters pending in Congress upon the request of either of the Houses or of any committee," for the reasons set forth in those opinions. (12 Op. Atty. Gen., 544.) Attorney-General Wirt (1 Op., 329) says, September 14, 1821, in regard to the act of Congress which prescribes the duties of the Attorney-General: "This act limits me to questions of law propounded by the President and heads of departments; and to these limits I have made it a rule to confine myself, on the ground that in a Government purely of laws no officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the positive law of the land has drawn around him. (See also 1 Op., 211, June 12, 1818; 1 Op., 253, December 22, 1818.)

Attorney-General J. J. Crittenden, June 15, 1852, declines an opinion requested by a committee of Congress, on the ground of Attorney-General Wirt's opinion of February 3, 1820 (1 Op., 216), and says as to his duties: "Those duties are prescribed and limited by law, by his commission, and his oath of office. * * * To answer the questions you have been pleased to propose does not fall within the limits of the duty or legal power of the Attorney-General, but would be a wide departure from his appointed sphere of action." (5 Op., 561.)

Attorney-General Edward Bates, December 14, 1861, declining to give an opinion in answer to a resolution of the United States Senate requesting it, says that he would be "compelled to decline compliance with the request of the Senate, on the ground that in the absence of any statutory authority to give official opinions to the legislative department of the Government, the assumption of such power by the Attorney-General would be in violation of his oath of office, and of dangerous example." (10 Op., 464.)

Attorney-General George H. Williams, March 26, 1872, says: "I find that my predecessors in office have made numerous decisions to the effect that the Attorney-General is only authorized to give his official opinion upon a question of law submitted to him for that purpose by the President or the head of one of the Executive Departments. I do not think that the act 'to establish the Department of Justice' (16 Stats., 162) changes his rights or his duties in respect to his official opinions." (14 Op. Atty. Gen., 21.)

Attorney-General Williams, January 20, 1873, requested by committee of United States Senate for opinion on the construction of Choctaw-Chickasaw treaty, says: "I can not recognize the right of any committee of Congress to call for such an opinion for their use in matters of legislation; and if given for that purpose it would be entitled to no more consideration in Congress than the opinion of any other individual presumed to have a knowledge of legal matters. * * * My authority to give such opinions is confined by the law to matters which concern some departmental action of the Government." (14 Op. Atty. Gen., 177.) (Opinions cited 1 Op. 233, 335, 492; 2 Op., 409; 10 Op., 164; 12 Op., 544.)

DUTY OF ATTORNEY-GENERAL.

The Attorney-General is not authorized, by the law creating and defining his office, to give legal opinions at the call of either House of Congress or of Congress itself. His duty to render such opinions is limited to calls from the President and heads of departments.

Attorney-General Charles Devens, March 27, 1878, declines an opinion requested by resolution of House of Representatives, and says: "The authority of the Attorney-General to render his official opinion is limited by the laws which create and define his office, and does not permit him to give advice at the call of either House of Congress or of Congress itself, but only to the President or the head of an Executive Department of the Government." (2 Op., 409; 5 Op., 561; 10 Op., 164; 12 Op., 544; 14 Op., 17; 14 Op., 177, cited.)

It is not the duty of the Attorney-General to give opinions on questions of fact (Op. Sept. 11, 1852, 5 Op., 626; April 3, 1820, 1 Op., 346.)

The Attorney-General will not give an opinion on a case, submitted by the head of a Department, which is not pending in his Department and subject to his decision. (10 Op., 50, June 12, 1861; 10 Op., 220, April 2, 1862.)

The Attorney-General will not give a speculative opinion on an abstract question of law which does not arise in any case presented for the action of an Executive Department. (April 11, 1865, 11 Op., 189, see also July 20, 1868, 12 Op., 453; January 8, 1872, 13 Op., 368.)

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Supreme Court of the United States.

Nos. 346, 347 and 348.—October Term, 1905.

346	The United States, Appellant, *vs.* The Cherokee Nation.	Appeals from the Court of Claims.
347	The Eastern Cherokees, Appellants, *vs.* The Cherokee Nation and The United States.	
348	The Cherokee Nation, Appellant, *vs.* The United States.	

[April 30, 1906.]

Section 68 of the act of Congress of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation and for the disposition of town sites therein described, and for other purposes" (32 Stat., 726), reads as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

February 20, 1903, the Cherokee Nation filed a petition in the Court of Claims asking judgment on an account rendered by Slade & Bender, pursuant to the treaty of March 3, 1893, (27 Stat. 640,) with interest.

March 3, 1903, an act was approved entitled "An act making appropriations for the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purpose," (32 Stats., 996), containing the following provisions:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July 1st, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive Document Numbered Three hundred and nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in said H. R. Ex. Doc. No. 309, 57th Cong., 2d sess., is therein referred to as "the award rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893."

March 14, 1903, a petition was filed on behalf of all the Eastern Cherokees, both west and east of the Mississippi River, alleging in substance that there was due to the Eastern Cherokees, upon the account of Slade & Bender, the sum of $1,111,284.70, with interest from June 12, 1838, as an award against the United States or, if the court should not hold said account as an award, the sum of $1,761,447.27, with interest at 5 per cent from the same date, together with interest on the income annually accruing, at the rate of five per cent per annum until paid, by virtue of the treaties of 1828, (7 Stat. 313,) and the treaty of 1835–36, commonly known as the "treaty of New Echota." But at the trial of the case no contention was made for this larger amount.

March 20, 1903, a petition was filed on behalf of certain Eastern

Cherokees, living east of the Mississippi, amended September 3, 1903, when petitioners took the title of the Eastern and Emigrant Cherokees, asserting their claim to a *pro rata* share of—

"That portion of the removal and subsistence fund improperly taken by the United States from the five million fund on account of removal of Eastern Cherokees, as found by the expert accountants, Messrs. Slade & Bender, April 28, 1894, the said five million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the Government to the Eastern Cherokees for the sale of their lands in North Carolina, Georgia, and Tennessee, or east of the Mississippi River, as set forth in article 1st of the treaty of New Echota, in north Georgia, on March 14, 1835, and articles 2 and 3 of the supplemental treaty, proclaimed May 23, 1836, this sum so misapplied amounting, in accordance with said accounting, to $1,111,284.70, with interest at 5 per cent per annum from the date of said wrongful taking, June 12, 1838, to date."

The three petitions were consolidated and heard as one case, and although in effect the proceedings were in equity, findings of fact and conclusions of law were filed.

Among the facts found were these:

"XVIII.

"By section 14 of the act of Congress entitled 'An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1889, and for other purposes,' approved March 2, 1889 (25 Stats., 1005), the President was authorized to appoint three commissioners to negotiate with the Indian tribes owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and he did appoint David H. Jerome, Alfred M. Wilson and Warren G. Sayre such commissioners.

"By virtue of the authority contained in an act of the Cherokee national council, approved November 16, 1891, Elias C. Boudinot, Joseph A. Scales, Roach Young, William Triplett, Thomas Smith, Joseph Smallwood, and George Downing were duly appointed commissioners—

'To meet and enter into negotiations with the above-named commission, appointed by the President of the United States, for the cession of the lands of the Cherokee Nation west of the 96th degree of west longitude, and for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled.'

"By said act of Congress it was made the duty of said commissioners appointed by the President to report all agreements resulting from such negotiations to the President, to be by him reported to the Congress at its next session, and by the act of the Cherokee council it was made the duty of the commissioners on the part of the Cherokee Nation to report all their proceedings in full to the national council for its approval and ratification. (Ex. Doc. 56, 52d Cong., 1st sess., 17.)

"At the outset of the negotiations between said commissioners for the purchase and sale of said lands, which were known as the 'Cherokee Outlet,' the commissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as 'a condition precedent to any agreement for the sale of the land' that some adjustment of such contentions should be made.

"On the 19th of December, 1891, after prolonged negotiations, the commissioners above named entered into articles of agreement, by Article I of which it was agreed that—

'The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth (100°) degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth (96°) degree west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by Executive order, dated August 10, 1860, the tract of land embraced within the above boundaries containing eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less.'

"By article 2 that—

'For and in consideration of the above cession and relinquishment the United States agrees:'

"First. That it will remove from the limits of the Cherokee Nation as trespassers certain described persons.

"Second. That a certain article of the antecedent treaty of July, 1866, should be abrogated and held for naught.

"Third. That the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction in certain cases.

"Fourth. That—

'The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall, at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found

upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.'

"Fifth. That certain citizens of the Cherokee Nation should have the right to select lands as homesteads under certain conditions; and

"Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States shall pay to the Cherokee Nation, at such times and in such manner as the Cherokee national council shall determine, the sum of $8,595,736.12 in excess of the sum of $728,389.46, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River.

"Said articles of agreement were accepted, ratified, and confirmed on the part of the Cherokee Nation by an act of the national council approved January 4, 1892, and were also accepted, ratified, and confirmed on the part of the United States by act of Congress of March 3, 1893 (27 Stat. L., 640).

"Prior to the acceptance and ratification of said agreement on the part of the United States, as aforesaid, the commissioners on behalf of the United States, as required by the law under which they were appointed, had reported to the President the making of the articles of agreement aforesaid, and by way of explanation said:

'As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

'The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

'Whatever that construction is, the Indian must abide by. There is no appeal except to Congress. Without going specifically into details the Cherokees claim that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them. They also desire to include lands as well as money, but they were induced to eliminate 'lands' from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected.' (Sen. Ex. Doc. 56, 52d Cong., 1st sess., pp. 11, 12.)

"Gen. Thomas J. Morgan, Commissioner of Indian Affairs, in his report to the Secretary of the Interior on February 6, 1892, made the following explanation and comment on the fourth section of article 2, to wit:

'The fourth section of article 2 provides for an accounting between the United States and the Cherokee Nation. The work necessary to render this account will be very heavy, and much time will be necessary to

properly prepare the same. On this provision of the agreement the commissioners say:

"'The Government has made the accounting, has kept the books, has construed the treaties. If this has been done properly no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for legal discharge of the old ones."

'This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it.

'In your reference of the matter to this office you said:

"'Particular attention is called to section 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions."

'In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation, under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this office within a reasonable time, say about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement herewith inclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose.' (Senate Ex. Doc. No. 56, 52d Cong., 1st sess., p. 8.)

"This report of the Commissioner was, on or about February 8, 1892, referred by the Secretary of the Interior to the Assistant Attorney-General for the Interior Department 'for his consideration and report upon the legality of the contract, the sufficiency of the proposed bill, and his views upon the questions of law relating to the subject,' and on or about February 25, 1892, said officer reported thereon, as appears in said Senate Executive Document 56, Fifty-second Congress, first session, saying, among other things:

'The report and agreement were referred to the Commissioner of Indian Affairs, who, under date of February 6, 1892, reported favorably on the agreement, and transmitted with his report the draft of a bill to be submitted to Congress to ratify and carry out the provisions thereof. . . . The agreement contains two articles. The first relates to the cession and the second to the consideration therefor. . . .

'The considerations for said cession, as contained in article 2, are set forth under six subdivisions. . . .

'The fourth and next provision of article 2 of the agreement requires the United States to render to the Cherokee Nation a complete accounting of all money agreed to be paid to the Indians or which they may be

entitled to under any treaty or act of Congress since 1817. And if said accounting is satisfactory Congress shall make the necessary appropriation to pay the same. But if the accounting is not satisfactory, then the Cherokees to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

'I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting.

'The Commissioner of Indian Affairs asks for a special appropriation of $5,000 to enable him to make the accounting.'

"All of these reports were before the Congress when it accepted and ratified said articles of agreement by act of March 3, 1893 (27 Stat L., 641), in the following language, to wit:

'Which said agreement is fully set forth in the message of the President of the United States, communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the 'Cherokee Outlet;' and said agreement is hereby ratified by the Congress of the United States, subject, however, to the Constitution and laws of the United States and to acts of Congress that have been or may be passed regulating trade and intercourse with the Indians, and subject also to certain amendments thereto, as follows: . . . (Amendments not important here.) . . .

'And the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States; provided that the money hereby appropriated shall be immediately available, and the remaining sum of eight million three hundred thousand dollars, or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal instalments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated;

* * * * * *

'The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement, as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands;

* * * * * *

'And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become, and be taken to be and treated as a part of the public domain.'

"XIX.

"By said act of March 3, 1893, ratifying said agreement for the purchase of the 'Cherokee Outlet' the Congress also provided as follows:

"The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement.'

"Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was by the Secretary of the Interior referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted was accepted by the Cherokee Nation by an act of its National Council approved December 1, 1894, and no suit was thereafter brought by the Cherokee Nation against the United States charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its National Council above referred to, did notify the Secretary of the Interior of the acceptance by said nation of said account as so stated by Messrs. Slade and Bender, and did request said Secretary of the Interior to notify the Congress of the United States of such acceptance, and on the 7th of January, 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

'SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stat., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of Cherokee National Council accepting such accounting.

'The Speaker of the House of Representatives.' (House Ex. Doc. No. 182, 53d Cong., 3d sess.)

"XX.

"The report and accounting made by said James A. Slade and Joseph T. Bender, referred to in the foregoing finding, is in the words and fig-

ures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

'The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement [a number of demands made by the Cherokee Nation were disallowed], and the result of the finding is submitted in the following schedule:

'Under the treaty of 1819:	
Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'school' fund (With interest from February 27, 1819, to date of payment.)	$2,125 00
Under treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund..... (With interest from June 12, 1838, to date of payment.)	1,111,284 70
Under treaty of 1866:	
Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation..... (With interest from January 1, 1874, to date of payment.)	432 28
Under act of Congress, March 3, 1893:	
Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund..... With interest from July 1, 1903, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.'	20,406 25

'Washington, D. C., April 28, 1894.
(Signed) JAS. A. SLADE.
JOS. T. BENDER.'

"XXI.

"In arriving at the item of $1,111,284.70 the accountants among other tabulations made the following statement of the account:

'Figuring upon the basis stated in the ninth article of the treaty of 1846, and following the Auditor's and Comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067 the excess of payments over the amounts appropriated by the United States for that purpose, the true statement of the account is as follows:

For improvements		$1,540,572 27
For ferries		159,572 12
For spoliations		264,894 09
For removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items..	$335,105 91 1,047,067 00	1,382,172 91
For debts and claims upon the Cherokee Nation		101,348 31
For the additional quantity of land ceded to the nation		500,000 00
For amount invested as the general fund of the nation		500,880 00
For subsistence furnished after expiration of one year, under agreement that it should be charged to treaty fund		172,816 47
		4,621,756 17
For lands and possessions		5,000,000 00
For spoliations		264,894 09

Balance of $600,000 applicable to removal	$335,105 91
Appropriation of June 12, 1838	1,047,067 00
	6,647,067 00
From which deduct charges as above	4,621,756 17
Balance to be distributed per capita	2,025,310 83
Deduct amount actually distributed as already explained	914,026 13
Balance due	1,111,284 70

"The sum of $914,026.13, actually distributed to the Eastern Cherokees in 1852, out of the above balance of $2,025,310.83, was appropriated as follows:

Amount found due by Treasury officials, under article 9, 1846, in the report of the Auditor and Comptroller of December 3, 1849.	$627,603 95
Erroneous charge corrected by act of February 27, 1851	96,999 42
Erroneous charge account subsistence, corrected by Congress, September 30, 1850	189,151 24
	914,026 13

"This amount of $914,026.13 was distributed solely to 14,098 Eastern Cherokees in the West and 2,133 Eastern Cherokees who remained East.

"Interest on the above sum of $914,026.13 at 5 per cent from June 12, 1838, was also appropriated by Congress and distributed per capita to said Eastern Cherokees in the same payment. The balance to be distributed per capita according to the above report and which was not distributed, to wit, $1,111,284.70, is the sum of which the Eastern Cherokees complain they were deprived in the settlement of 1852; that while they received only $56.31 per capita, excluding interest, they should have received the further sum of $1,111,284.70, or a total of $2,025,310.83, as appears in the above account rendered as the true balance under article 9, making them a total per capita of $124.78.

"The settlement made with the Old Settlers was as set forth in Finding XVII.

"XXII.

"Neither the whole or any portion of the various sums with interest found and stated by the concluding schedule of the so-called Slade-Bender report to be due to the Cherokee Nation under the treaties and acts of Congress therein referred to have been paid to the Cherokee Nation, or to any officer, agent, or other person acting in its behalf.

"With the exception of the provision contained in the act of March 2, 1895, making appropriations for the legislative, executive, and judicial expenses of the Government, directing the Attorney-General to review and report upon the conclusion of law disclosed in the account of Slade and Bender, and the passing of the provisions of the acts of July 1, 1902, and March 3, 1903, conferring jurisdiction upon the United States Court of Claims to hear and determine these causes, the Congress has taken no action whatever with respect to the said account of Slade and Bender or the amounts found due thereunder.

"Acting under said direction of March 2, 1895, above referred to, the Attorney-General of the United States, on December 2, 1895, addressed a communication to the Congress wherein he advised that body of his disagreement with the conclusions reached by said Slade and Bender.

Said communication of the Attorney-General was, on December 2, 1895, by the Congress referred to the Committee on Indian Affairs and ordered to be printed, and the same appears in Senate Executive Document No. 16, Fifty-fourth Congress, first session."

May 18, 1905, the court "adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of..... With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.	$2,125 00
Item 2. The sum of..... With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.	1,111,284 70
Item 3. The sum of..... With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.	432 28
Item 4. The sum of..... With interest thereon from July 1, 1903, to date of payment.	20,406 25

"The proceeds of said several items, however, to be paid and distributed as follows:

"The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation, and shall be credited on the proper books of account to the principal of the 'Cherokee school fund' now in the possession of the United States and held by them as trustees.

"The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation, to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

"The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the 'Cherokee national fund,' now in the possession of the United States and held by them as trustees.

"The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

"First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota,

as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

"So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same, upon the making of an appropriation by Congress to pay this judgment.

"The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States."

The facts are stated *in extenso* in the report of the case, 40 Ct. Cl. 252, occupying some forty pages.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Of the four items of the amounts allowed, only one, that for $1,111,284.70, need be considered here.

(1) The correctness of the account is conceded, and the question is whether the United States were properly held liable therefor. The Court of Claims ruled that the account rendered by Slade and Bender under the agreement between the United States and the Cherokee Nation, ratified by Congress, was neither an award nor an account stated, but that the United States were nevertheless liable in the circumstances for the balance found.

The case is thus put by Chief Justice Nott:

"But while the account was neither an award nor an account stated, it must be conceded that the scope of the accounting was intended to be as broad as the causes of action secured by the agreement to the Cherokee Nation 'the right within twelve months to enter suit against the United States in the Court of Claims for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting.' That is to say, the court, or the accountants, were to go behind statutory and treaty bars and receipts in full and were to consider 'any alleged or declared amount of money promised but withheld' 'under any of said treaties or laws.' This meant that there were to be no technical defences set up, no pleas of *res judicata*, no releases or relinquishments, compromises or settlements; or it meant nothing. . . .

"Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them so to believe)

that all of their claims and rights and equities were to be reopened and re-examined *de novo;* and that upon the faith of that belief they made a cession of the Outlet. In the opinion of the court this case is simply one to recover purchase money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be delivered until the purchase money is paid or secured or, at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase money should be paid soon. But, nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a a case of sale and delivery and non-payment of the purchase money for the thing sold and delivered. The United States were willing to pay; the Cherokee Nation wanted the payment made at the earliest possible day; both parties agreed upon a method by which it should be paid as nearly immediately as was possible. The United States were to render their account 'without delay;' if the Cherokee Nation accepted it, the amount was to be appropriated by Congress; such 'appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.' If the Cherokee Nation did not accept the accounting, or regarded it as incorrect or unjust, and carried it into the courts and recovered a judgment, Congress was to appropriate 'at the its next session after such case shall be finally decided.' Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have made the obligation to pay promptly more unequivocal and specific. Time was of the essence of the contract, so far as the words of the parties could make it.

"The court does not intend to imply that when the account of Slade and Bender came into the hands of the Secretary of the Interior he was bound to transmit it to the Cherokee Nation. On the contrary, the Cherokee Nation had not agreed to be bound by the report of the accountants and could not claim that the United States should be. The accountants were but the instrumentality of the United States in making out an account. When it was placed in the Interior Department it was as much within the discretion of the Secretary to accept and adopt it or to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out, and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. When the account was thus received by the Cherokee Nation (May 21, 1894), the 'twelve months' of the agreement, within which the nation must consider it and enter suit against the other party in the Court of Claims, began to run, and with the nation's acceptance of the account (December 1, 1894) the session of Congress at which an appropriation should be made became fixed and

certain. The Secretary did not recall the account; the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was, at the same session, or certainly within the prescribed 'twelve months,' to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament, and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement."

Weldon, J., concurred with the Chief Justice in a separate opinion. Peelle, J., concurred in the judgment, but rested his conclusion on the ground that the United States were liable "to pay the expense of removal" of the Eastern Cherokees from their eastern home to the Indian Territory, under the treaties of 1835–36 and 1846, (7 Stat. 478; 9 Stat. 871,) and therefore to pay this conceded balance. The various treaties from 1817 down, the legislation, accountings, and proceedings were duly considered in arriving at the result reached. Wright, J., dissented.

We agree that the United States were liable, and think the liability might well be rested on both grounds, that is, that failing one it could be sustained on the other, but we do not deem it necessary to set forth in our own language what has already been so well stated by Chief Justice Nott and Judges Weldon and Peelle.

2. Recovery of the item of $1,111,284.70 was adjudged "with interest thereon at the rate of five per cent from June 12, 1838, to date of payment," and it is contended that the Court of Claims erred in this allowance of interest.

Under the eleventh article of the treaty of 1846 the Cherokees agreed to submit to the Senate of the United States, as umpire, the question whether interest should be allowed on the sums found due them. The Senate of the United States, as umpire, on September 5, 1850, found that interest should be allowed, in the following resolution: "Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid."

The Cherokees who had emigrated prior to 1835, with accessions to that date, were known as the "Old Settlers," or "Western Cherokees," and in the case of the *United States* v. *Old Settlers*, 148 U. S. 427, this court said in respect of the claim for interest:

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed at the rate of five

per centum per annum upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum then found due was less than should have been found by the amount of $212,376.94.

"Under section 1091 of the Revised Statutes, no interest can 'be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest;' and in *Tillson* v. *United States*, 100 U. S. 43, it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case, the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. (9 Stat. 556, c. 91.)

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item of $4,179.26, which stands upon different ground."

The Congress of the United States on numerous occasions had recognized the force of the decision of the Senate and made appropriations accordingly, appropriating the funds due as interest.

On September 30, 1850, Congress appropriated to the Eastern Cherokees, in reimbursing an amount improperly charged the treaty fund for subsistence, the sum of $189,422.76, with the provision:

"That interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate of the fifth of September, eighteen hundred and fifty." (9 Stat. 556.)

On February 27, 1851, Congress, in appropriating the amount of the *per capita* then conceded to be due the Eastern Cherokees, to wit, $724,603.37, provided as follows:

"And interest on the above sum, at the rate of five per centum per annum, from the twelfth day of June, eighteen hundred and thirty-eight, until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated." (9 Stat. 572.)

Congress on September 30, 1850, in appropriating the amount of the *per capita*, then conceded to be due the Old Settlers, provided:

"That interest be allowed and paid upon the above sums due respectively to the Cherokees and Old Settlers, in pursuance of the above-mentioned award of the Senate, under the reference contained in the said 11th Article of the Treaty of sixth August, eighteen hundred and forty-six." (9 Stat. 556.)

The question of interest was a "subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself" in 1846, and in the "agreement itself" in 1891, and is the same in principle as in the case of the Old Settlers.

3. Was the recovery given proper destination by the decree?

We refer to the same item, as there is really no controversy over the other three items, and the criticism as to the payment of item three is not material. If no proper agent of the Cherokee Nation to receive the 8432.28 can be found, it may be received by the United States as trustee.

The jurisdictional act of March 3, 1903, provided that "both the Cherokee Nation and said Eastern Cherokees, so-called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned;" and authorized the court "to render a judgment in favor of the rightful claimants, and also to determine, as between the different claimants to whom the judgment so rendered equitably belongs, either wholly or in part."

In the petition filed by the Cherokee Nation in this case it is declared that the Cherokee Nation is "a body politic," and "is, as such, the 'Cherokee tribe' mentioned in section 68 of the act of Congress aforesaid, [July 1, 1902, 32 Stat. 726,] and authorized thereby to bring this proceeding." But the language of the section is that jurisdiction is conferred to adjudicate "any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," and even if it were conceded that the Cherokee Nation could be treated as a body politic, not as a body corporate, but in the sense of a governmental community, we should say "the Cherokee tribe or any band thereof" means the Cherokee people as a people, or any band thereof, and not the Cherokee Nation as a body politic.

It should be observed that the term "Cherokee Nation" has been used as representing the people themselves; the government of the Cherokees; and the Government as trustee for all of its people, or for some of them as their rights might appear.

In the treaty of July 2, 1791, the "Cherokee Nation" was described as "all the individuals comprising the whole Cherokee Nation of Indians." In the treaty of 1835 these Indians are referred to as the "Cherokees" and as "The Cherokee Nation." In the treaty of 1846 as "The Cherokee Nation," "The Cherokee People," and "The Cherokees."

Under the first article of the treaty of 1846 the lands of the Cherokee Nation belonged to the whole Cherokee people. The lands sold east of the Mississippi River belonged to the Cherokee people as then existing as communal property. The Western Cherokees, so-called, that is to say, the Old Settlers, were paid for their interest in those lands as communal

owners. 148 U. S. 427. They were paid individually, a community within a community.

Mr. Chief Justice Nott treats of this matter thus:

"While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate, and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration *per capita*. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and head men of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the West, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed *per capita*. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund, but their rights were inextricably interwoven with the rights and equities of the Cherokees who were citizens of the nation, and the nation properly made no distinction when parting with the Outlet but demanded justice from the Cherokee point of view for all Cherokees who had been wronged by the non-fulfillment of the treaty of New Echota. As to these Eastern non-resident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.

"After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners."

And after referring to the present status of the Cherokee Nation as about to terminate, the Chief Justice says:

"In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person who should not be entrusted with the receipt and distribution of the moneys belonging to other persons."

The Court of Claims decreed that after deducting counsel fees, costs and expenses, the sum of $1,111,284.70, with interest, should be paid to

the Secretary of the Interior, to be by him received and held for the uses and purposes of paying costs and expenses as stated, and then distributing the remainder "directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

The eighth finding of fact was as follows:

"The Cherokee Indians who removed west of the Mississippi prior to May 23, 1836, were called 'Western Cherokees.' After the removal, under the treaty of 1835–36, of the Cherokees who had remained in the Cherokee country east of the Mississippi to the lands west of the Mississippi, the term 'Western Cherokees' was no longer distinctive, and the Cherokees who had theretofore been known as such were thereafter popularly known as 'Old Settlers.'

"The Cherokees who were domiciled east of the Mississippi River at the time of the making of the treaty of 1835–36, according to the census just then completed, were thereafter known as 'Eastern Cherokees,' the great body of whom subsequently, in 1838, moved to the lands west of the Mississippi."

So far as the "Old Settlers" are concerned, they have been fully paid and cannot be allowed to participate in this distribution. There had been a settlement with these Cherokees, which was reopened in the Old Settlers case, and they were allowed to assert any and all claims on their part against the United States. Judgment was thereafter rendered as to a portion of these claims in their favor, 148 U. S. 427, which judgment was thereafter paid in full by the United States, so that these Old Settlers have no standing in this action. And, indeed, they never had nor asserted any interest whatever in the claim herein involved and are not claimants. In the settlement of 1851, the cost of removal with which they were charged, did not diminish the five million dollar treaty fund but came entirely from the $600,000 added to that fund by the third supplemental article of the treaty of New Echota, and the payment that was made to them pursuant to the fourth article of the treaty of 1846 was not a third of the residuum of the treaty fund, but a sum equal to one-third. It was the Eastern Cherokees only who were interested in that residuum, and so article nine of that treaty provided for payment to the Eastern Cherokees of that balance, and for a fair and just settlement of all moneys due to the Cherokees and payment of the same *per capita* to the Eastern Cherokees. The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees.

The act of February 27, 1851, appropriating the amount due on the accounting under article nine of the treaty of 1846, provided that it should be in full satisfaction of all claims and demands of the Cherokee

Nation and that a receipt in full should be given. The receipts as given were signed by the individual Eastern Cherokees.

We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to "the Eastern and Western Cherokees," are perhaps liable to misconstruction, although limited to those "who were parties either to the treaty of New Echota as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River." This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers.

In view of the language of the jurisdictional acts of 1902 and 1903 in respect of the Cherokee Nation, we are not disposed to interfere with the Court of Claims in the allowance of fees and costs.

It is true that in the replication of the Cherokee Nation to the petition of the Eastern Cherokees this paragraph occurs:

"It denies that the Cherokee Nation in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred to, and for their exclusive use and benefit; and further denies that if it had collected or hereafter shall collect such moneys, the same would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise."

It is also true that by the acts of June 7, 1897, June 28, 1898, and July 1, 1902, the Cherokee Nation was practically incapacitated from acting as trustee, and by section 63 of the Cherokee allotment act, 32 Stat. 725, c. 1375, it was provided that "the tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six." But by joint resolution of March 2, 1906, Congress provided as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

Nevertheless, taking the entire record together, the various treaties, and acts of Congress, and of the Cherokee Councils, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs.

4. The Eastern and Emigrant Cherokees, in respect of whom it is stated in their petition, "That they number about 4,500 persons, more or less, all Eastern Emigrant Cherokees, residing for the most part in Cherokee, Graham, Swain, Clay, and Macon Counties, North Carolina, some in north Georgia, northern Alabama, and eastern Tennessee, together with about 1,500 emigrants, portions of their various families, gone West, nearly all of whom have been recognized as citizens and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina, and others of the same class, whose names or those of whose ancestors may be found on the rolls of 1835 and 1838," asked that one-fourth part of the whole sum recovered be set apart for them as their distributive share. But we think they are only entitled to receive the *per capita* payment with the Eastern Cherokees, and should obtain that payment accordingly.

The result is, that with the modification of the second subdivision of the fourth paragraph of the decree, relating to the $1,111,284.70 with interest, above indicated, the decree of the Court of Claims is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.